

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE RODNEY GILSTRAP

UNITED STATES DISTRICT COURT

FOR THE PLAINTIFF:

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(Proceedings recorded by mechanical stenography, transcript produced on CAT system.)

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1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Be seated, please.

5 Are the parties prepared to read into the record
6 those items from the list of pre-admitted exhibits used
7 during yesterday's portion of the trial?

8 MS. ENGELMANN: Yes, Your Honor.

9 THE COURT: Please proceed, Ms. Engelmann.

10 MS. ENGELMANN: Plaintiff, ContentGuard, has one
11 pre-admitted exhibit to read into the record, and it's
12 PX-1055C.

13 THE COURT: Any objection from Defendant?

14 MR. BRYAN ANDERSON: No, Your Honor.

15 THE COURT: Does Defendant have a similar
16 rendition to make?

17 MR. BRYAN ANDERSON: We do, Your Honor.

18 THE COURT: Please proceed.

19 MR. BRYAN ANDERSON: AX-385, AX-778C, AX-606C,
20 AX-897, AX-974C, AX-965C, AX-1102, AX-1147C.

21 THE COURT: All right. Are there objections from
22 the Plaintiff, Ms. Engelmann?

23 MS. ENGELMANN: No, Your Honor.

24 THE COURT: All right.

25 All right. Counsel, I have considered carefully

1 the written motions for judgment as a matter of law filed
2 under Rule 50(a) of the Federal Rules of Civil Procedure,
3 which were filed with the Court yesterday evening.

4 Under the rule, it is clear that if a party has
5 been fully heard on an issue during a trial and the Court
6 finds that a reasonable jury would not have a legally
7 sufficient evidentiary basis to find for that party on that
8 issue, the Court may resolve the issue by way of granting
9 judgment as a matter of law.

10 It's clearly stated in the rule that it's "may"
11 and not "shall." The parties have a right under Rule 50 to
12 reurge any motion not granted at the pre-verdict stage after
13 the verdict is entered.

14 Having considered the motions on their face and
15 the evidence presented during the course of the trial, the
16 Court is of the opinion that each and all of the motions
17 under Rule 50(a) should be and they are hereby denied.
18 Those include the motions set forth in Documents 1052, 1053,
19 1054, and 1055 filed in this case.

20 The parties' rights to reurge such post-verdict
21 remain unaffected.

22 All right. Is there anything from either party
23 before I bring in the jury and begin the final jury
24 instructions?

25 MR. BAXTER: Not from the Plaintiff, Your Honor.

1 MR. PRITIKIN: Not from the Defendant, Your Honor.

2 THE COURT: All right. I remind our guests in the
3 gallery that this is the most serious and important part of
4 a very serious and important proceeding. To the extent that
5 it is possible, I would request that our guests remain
6 seated, not come and go from the courtroom, and otherwise
7 use their best efforts to avoid any disruptions of any kind.

8 All right. Bring in the jury, Mr. Nance.

9 COURT SECURITY OFFICER: All rise for the jury.

10 (Jury in.)

11 THE COURT: Good morning, ladies and gentlemen.
12 Please have a seat.

13 Members of the jury, you have now heard the
14 evidence in this case. I'll now instruct you on the law
15 that you must apply. It is your duty to follow the law as I
16 give it to you.

17 As I've said previously, however, you, the jury,
18 are the sole judges of the facts.

19 Do not consider any statement that I have made
20 during the trial or that I make in these instructions as an
21 indication that I have any opinion about the facts in this
22 case.

23 These final jury instructions that I'm about to
24 give you orally now have been reduced to writing, and each
25 of you will have your own individual copy of these

1 instructions when you retire to the jury room to deliberate.

2 Accordingly, there's no pressing need for you to
3 take notes on these instructions unless you just
4 particularly want to. I would suggest to you that it is
5 more beneficial if you just listen to what I say and then
6 you'll have your own written copies to look at, if you need
7 to, once you retire to deliberate.

8 After I give you these instructions, the attorneys
9 in the case will make their closing arguments. Statements
10 and arguments of the attorneys are not evidence and are not
11 instructions on the law. They're intended only to assist
12 you, the jury, in recalling and understanding the evidence
13 and the parties' contentions.

14 A verdict form has been prepared for you. You
15 will take this verdict form with you to the jury room when
16 you retire to deliberate. And when you have reached a
17 unanimous agreement as to your verdict, you will have your
18 foreperson fill in the blanks in the verdict form, date it,
19 and sign it.

20 Answer each question in the verdict form from the
21 facts as you find them to be. Don't decide who you think
22 should win and then answer the questions to reach that
23 result.

24 Your answers and your verdict in this case, ladies
25 and gentlemen, must be unanimous.

1 In determining any fact and whether it has been
2 proven in this case, you may, unless otherwise instructed,
3 consider the testimony of all the witnesses, regardless of
4 who may have called them, and all exhibits received into
5 evidence, regardless of who may introduce -- who may have
6 introduced them. You may also consider any agreements or
7 stipulations of the parties during the case.

8 Certain exhibits were shown to you during the
9 trial as illustrations only. We call these documents
10 "demonstrative exhibits." Demonstrative exhibits are a
11 party's depiction, picture, or model to describe something
12 involved in the trial.

13 If your recollection of the evidence differs from
14 the demonstrative, rely on your recollection. While
15 demonstrative exhibits may be helpful to you in determining
16 the issues, demonstratives of both parties are not evidence,
17 and they are not proof of any fact.

18 If they do not correctly reflect the evidence in
19 the case, you should disregard the demonstratives and
20 determine the facts from the underlying evidence.
21 Demonstrative exhibits will not be available for you to view
22 during your deliberations.

23 Some evidence has been presented to you in the
24 form of answers to one of the party's written
25 interrogatories. These answers were given in writing and

1 under oath before the trial in response to questions that
2 were submitted in writing under established procedures of
3 the Court. You should consider the answers insofar as
4 possible in the same way as if they were made from the
5 witness stand.

6 By allowing the testimony or other evidence to be
7 introduced over the objection of an attorney, the Court did
8 not indicate an opinion as to the weight or effect of such
9 evidence. As I've said before, you are the sole judges of
10 the credibility and believability of all the witnesses and
11 what amount of weight and effect to give to all of the
12 evidence in the case.

13 When the Court sustained an objection to a
14 question addressed to a witness, you must disregard the
15 question entirely, and you may draw no inference from its
16 wording or speculate about what the witness would have said
17 if he or she had been permitted by the Court to answer the
18 question.

19 At times during the trial, it was necessary for
20 the Court to talk with the lawyers here at the bench outside
21 of your hearing or by calling a recess and talking to them
22 when you were outside of the courtroom.

23 This happened because often there are things that
24 occur during a trial that do not directly involve the jury.
25 You should not speculate about what was said during any

1 discussions that took place outside of your presence.

2 Additionally, the following are not evidence, and
3 you must not consider them as evidence in deciding the facts
4 in this case: Statements, arguments, questions, or
5 objections of the attorneys, or anything that you may see or
6 hear when the Court is not in session, even if what you see
7 or hear is done or said by one of the parties or by one of
8 the witnesses or the attorneys.

9 As I said during jury selection and during my
10 preliminary instructions to you, your decisions in this case
11 should be based solely on the sworn testimony that you heard
12 from the witness stand during the trial and from the
13 exhibits that have been admitted into evidence as a part of
14 the record in this case.

15 Certain testimony in this case has been presented
16 to you through depositions. A deposition is the sworn,
17 recorded answers to questions asked to a witness in advance
18 of the trial. If a witness cannot be physically present to
19 testify in person from the witness stand, the witness's
20 testimony may be presented under oath in the form of a
21 deposition.

22 Before the trial, the attorneys representing the
23 parties in the case questioned these deposition witnesses
24 under oath. A court reporter was present and recorded the
25 testimony.

1 Deposition testimony is entitled to the same
2 consideration as testimony given by a witness in person from
3 the witness stand in open court. Accordingly, you should
4 judge the credibility and weigh the importance of deposition
5 testimony to the best of your ability, just as if the
6 witness had testified in open court.

7 While you should consider only the evidence in
8 this case, you are permitted to draw such reasonable
9 inferences from the testimony and exhibits as you feel are
10 justified in the light of common experience.

11 In other words, ladies and gentlemen, you may make
12 deductions and reach conclusions that reason and common
13 sense lead you to draw from the facts that have been
14 established by the evidence and the testimony in this case.
15 You're the sole judges of the credibility or believability
16 of each witness and the weight to be given to each of the
17 witness's testimony.

18 An important part of your job will be making
19 judgments about the testimony of witnesses who testified in
20 this case. You should decide whether you believe all or any
21 part of what each person had to say and decide how important
22 that testimony was.

23 In determining the weight to give to testimony of
24 a witness, you should ask yourself whether there was
25 evidence tending to prove that the witness testified falsely

1 concerning some important fact or whether there was evidence
2 that at some other time the witness said or did something or
3 failed to say or do something that was different from the
4 testimony the witness gave during the trial held before you.

5 Unless I instruct you otherwise, you may properly
6 determine the testimony of a single witness to be sufficient
7 to prove any fact, even if a greater number of witnesses may
8 have testified to the contrary if, after considering all of
9 the evidence, you believe that single witness.

10 There are two types of evidence that you may
11 consider in properly finding the truth as to the facts in
12 this case.

13 One type of evidence is called direct evidence,
14 such as the testimony of an eyewitness.

15 The other type of evidence is called indirect or
16 circumstantial evidence; that is, the proof of a chain of
17 circumstances that indicates the existence or non-existence
18 of certain other facts.

19 As a general rule, members of the jury, the law
20 makes no distinction between direct evidence or
21 circumstantial evidence but simply requires that you find
22 the facts, based on the evidence presented, both direct and
23 circumstantial.

24 When knowledge of a technical subject may be
25 helpful to the jury, a person who has special training or

1 experience in that technical field, called an expert
2 witness, is permitted to state his or her opinions on those
3 technical matters.

4 However, you're not required to accept those
5 opinions. As with any other witness, it is solely up to you
6 to decide whether or not to rely on the testimony of any and
7 all of the witnesses.

8 There are two standards of proof to be applied in
9 this case, two burdens of proof to be applied in this case.
10 One is the preponderance of the evidence. The other is
11 clear and convincing evidence.

12 ContentGuard, the Plaintiff, has the burden of
13 proving infringement and damages by a preponderance of the
14 evidence.

15 As I mentioned at the beginning of the trial,
16 preponderance of the evidence means evidence that persuades
17 you that a claim is more likely true than not true. If the
18 evidence is equally weighted, then the preponderance burden
19 of proof has not been met.

20 ContentGuard has the burden of proving willful
21 infringement and invalidity by clear and convincing
22 evidence. Apple -- excuse me -- ContentGuard has the burden
23 of proving willful infringement by clear and convincing
24 evidence.

25 Apple, the Defendant, has the burden of proving

1 invalidity by clear and convincing evidence.

2 Clear and convincing evidence means evidence that
3 produces in your mind a firm belief or conviction as to the
4 matter at issue.

5 When a party has the burden of proving any claim
6 or defense by clear and convincing evidence, it means that
7 the evidence must have persuaded you that the claim or
8 defense is highly probable.

9 Although proof to an absolute certainty is not
10 required, the clear and convincing evidence standard
11 requires a greater degree of persuasion than is necessary
12 for the preponderance of the evidence standard.

13 However, the clear and convincing evidence
14 standard is not so high as the standard used in criminal
15 law, which is evidence beyond a reasonable doubt. If the
16 proof establishes in your mind a firm belief or conviction
17 that something is true, then the clear and convincing
18 evidence standard has been met.

19 In determining whether any fact has been proved,
20 you may, unless otherwise instructed, consider the
21 stipulations of the parties, the testimony of all the
22 witnesses, regardless of who may have called them, and all
23 of the exhibits received into evidence during the course of
24 the trial, regardless of who may have produced them.

25 As I did at the beginning of the case, I will

1 first give you a summary of each side's contentions in this
2 case, and I'll then provide you with detailed instructions
3 on what each side must prove to win on each of its
4 contentions.

5 ContentGuard has asserted five patents in this
6 litigation. Four of the patents have generally been called
7 through the trial as -- been called to be the Stefik
8 patents. Those are Patent -- U.S. Patent No. 6,963,859,
9 8,370,956, 8,393,007, and 7,523,072.

10 The other patent has generally been called the
11 meta-rights patent or the Nguyen patent, and that is United
12 States Patent No. 8,001,053.

13 The Plaintiff, ContentGuard, alleges that the
14 Defendant, Apple, has infringed Claim 1 of Patent
15 No. 6,963,859, which we've commonly called throughout the
16 trial as the '859 patent; Claim 1 of Patent No. 7,523,072,
17 which has been called, for shorthand purposes through the
18 trial, the '072 patent;

19 Claim 7 of Patent No. 8,370,956, which has been
20 called the '956 patent during the trial;

21 And Claim 6 of Patent No. 8,393,007, which has
22 been called the double 07 or the '007 patent;

23 And Claim 1 of Patent No. 8,001,053, which we've
24 called the '053 patent.

25 They've alleged infringement by making, using,

1 selling, and/or offering for sale in the United States
2 products with iTunes and/or iBooks applications, including
3 iPhones, iPads, iPods, Mac desktops, and laptops, and by
4 using Apple's iTunes servers to distribute DRM-protected
5 movies, TV shows, and books.

6 The patents listed are sometimes referred to as
7 the asserted patents, or they're sometimes referred to as
8 the patents-in-suit. And the claims listed are sometimes
9 referred to as the asserted claims.

10 ContentGuard, the Plaintiff, also contends that
11 Apple's alleged infringement has been willful. ContentGuard
12 seeks damages from Apple in the form of a reasonable
13 royalty.

14 Apple, the Defendant, denies that it has infringed
15 the asserted claims of these five patents. Apple denies
16 that any infringement you find was willful.

17 Further, Apple contends that ContentGuard's
18 asserted claims are invalid because they would have been
19 obvious to a person of ordinary skill in the field at the
20 time the invention -- at the time of the invention in the
21 light of one or more prior art references.

22 Apple also denies that ContentGuard is entitled to
23 any damages.

24 I'll now give you instructions and definitions to
25 help you in answering the questions that will be presented

1 to you.

2 Your job is to decide whether the asserted claims
3 of the asserted patents have been infringed and whether any
4 of the asserted claims are invalid.

5 If you decide that any claim of a patent-in-suit
6 has been infringed and is not invalid, you will then need to
7 decide what amount of money damages, if any, is to be
8 awarded to ContentGuard as compensation for such
9 infringement.

10 I'm going to read that sentence over again.

11 If you decide that any claim of the patent-in-suit
12 has been infringed and is not invalid, then you'll decide --
13 need to decide what amount of money damages is to be awarded
14 to ContentGuard as compensation for such infringement.

15 Before you can decide many of the issues in the
16 case, you'll need to understand the role of patent claims.
17 The patent claims are the numbered sentences at the end of
18 each patent.

19 The claims are important because it is the words
20 of the claims themselves that define what the patent covers.
21 The figures and the text in the rest of the patent provide a
22 description and/or examples of the invention and provide
23 context for the claims, but it is the claims, ladies and
24 gentlemen, that define the breadth of the patent's coverage.

25 Claims may describe methods or products, such as

1 machines or chemical compounds or processes for making or
2 using a product.

3 In this case, ContentGuard has asserted both
4 product claims and method claims.

5 Claims are usually divided into parts or steps
6 called limitations or elements.

7 For example, a claim that covers the invention of
8 a table may recite a tabletop, four legs, and the glue that
9 secures the legs to the tabletop. In this example, the
10 tabletop, legs, and glue are each separate limitations or
11 elements of the claim.

12 You first need to understand what each claim
13 covers in order to decide whether or not there is
14 infringement of the claim and to decide whether or not the
15 claim is invalid.

16 The law says it's my role as the judge to define
17 the terms of the claims, and it's your role as the jury to
18 apply my definitions to the issues that you are asked to
19 decide in this case.

20 Therefore, as I explained to you at the start of
21 the case, I have determined the meaning of the claims, and I
22 have provided to you my definitions of certain claim terms.
23 Those are in your juror notebooks.

24 You must accept my definitions of these words in
25 the claims as being correct. It's your job to take these

1 definitions that I've supplied and apply them to the issues
2 that you are being asked to decide, including both the
3 issues of infringement and invalidity.

4 For claim terms that I have not construed or
5 defined, you are to use the plain and ordinary meaning in
6 the context of the asserted patents as understood by one of
7 ordinary skill in the art meaning in the field of technology
8 of the patent at the time of the invention.

9 Now, several times in these instructions I will
10 refer to a person of ordinary skill in the art or a person
11 of ordinary skill in the field of the invention.

12 A person of ordinary skill in the art of the
13 patents-in-suit, as of the filing date of the
14 patents-in-suit, is someone with a bachelor's degree in
15 electrical engineering, computer science, or a related field
16 and two years of industry experience in digital rights
17 management or computer security, or it may be a person with
18 a Master's of Science degree in electrical engineering,
19 computer science, or a related field.

20 I'll now explain how a claim defines what is
21 covered.

22 A claim sets forth in words a set of requirements.
23 If a device or method satisfies each of the requirements,
24 then it is covered by the claim.

25 There can be several claims in a patent. A claim

1 may be narrower than another claim by setting forth more
2 requirements, or a claim may be broader than another claim
3 by setting forth fewer requirements. The coverage of a
4 patent is assessed on a claim-by-claim basis.

5 In patent law, the requirements of a claim are
6 also -- are often referred to as the claim elements or the
7 claim limitations.

8 When a product or method meets all of the
9 requirements of a claim, the claim is said to cover that
10 product or method and that product or method is said to fall
11 within the scope of the claim.

12 In other words, a claim covers a product or method
13 where each of the claim elements or limitations is present
14 in that product or method.

15 If a product or method is missing even one
16 limitation or element of a claim, the product or method is
17 not covered by the claim. If the product or method is not
18 covered by the claim, that product or method does not
19 infringe that claim.

20 The beginning portion, or the preamble, of a
21 number of the claims uses the word "comprising." The word
22 "comprising," when used in the preamble, means "including"
23 or "containing." When "comprising" is used in the preamble,
24 a device that includes all of the limitations of the claim
25 is covered by the claim even if the device contains

1 additional elements.

2 If any person makes, uses, sells, or offers to
3 sell within the United States what is covered by the patent
4 claims without the patent owner's permission, that person is
5 said to infringe the patent.

6 In reaching your decision on infringement, ladies
7 and gentlemen, keep in mind that only the claims of a patent
8 can be infringed. You must compare the asserted claims, as
9 I have defined each of them, to the accused products and
10 determine whether or not there is infringement.

11 For determining infringement, you should not
12 compare the accused products with any specific example of
13 the invention set out in the patent with the patentholder's
14 commercial products or with the prior art.

15 The only correct comparison is to compare the
16 accused products with the language of the claims themselves,
17 as I've explained their meaning to you.

18 You must consider each claim individually and must
19 reach your decision as to each assertion of infringement
20 based on my instructions about the meaning and scope of the
21 claims, the legal requirements for infringement, and the
22 evidence presented to you by the parties.

23 I'll now instruct you on how to decide whether or
24 not Apple has infringed any of the Asserted Claims of
25 ContentGuard's patents.

1 Infringement is assessed on a claim-by-claim
2 basis. Therefore, there may be infringement as to one claim
3 but no infringement as to another claim in a patent.

4 To prove infringement, ContentGuard must prove
5 that the accused products and the methods include every
6 limitation or element of an asserted claim. If an accused
7 product omits any requirement required by an asserted claim,
8 it does not infringe that claim.

9 There are two types of claims that ContentGuard
10 alleges Apple has infringed: Method claims and product
11 claims.

12 The asserted method claims in this case are Claim
13 1 of the '072 patent and Claim 1 of the '053 patent.

14 In general, a method claim is infringed only when
15 a single person or entity, without the patent owner's
16 permission, performs each and every step of the method claim
17 in the United States while the patent is in force.

18 Mere sale of a product capable of performing the
19 infringing method does not constitute infringing use of the
20 method. Likewise, selling a product capable of practicing a
21 patented method does not constitute selling the patented
22 method.

23 The asserted product claims are Claim 1 of the
24 '859 patent; Claim 7 of the '956 patent; and Claim 6 of the
25 '007 patent. Infringement of a product claim occurs when a

1 person, without the patent owner's permission, makes, uses,
2 offers to sell, or sells the patented invention anywhere in
3 the United States while the patent is in force.

4 As I've said, the product claims in this case are
5 Claim 1 of the '859 patent; Claim 7 of the '956 patent; and
6 Claim 6 of the '007 patent.

7 And the method claims are Claim 1 of the '072
8 patent and Claim 1 of the '053 patent.

9 ContentGuard, the Plaintiff, accuses Apple, the
10 Defendant, of directly infringing the following method
11 claims and product claims of the asserted patents: Claim 1
12 of the '859 patent; Claim 1 of the '072 patent; Claim 7 of
13 the '956 patent; Claim 6 of the '007 patent; and Claim 1 of
14 the '053 patent.

15 You must determine separately for each asserted
16 claim whether or not there has been infringement.

17 A patent can be directly infringed even if the
18 alleged infringer did not have knowledge of the patent and
19 without the infringer's knowing that what it is doing is
20 infringement of the claim.

21 A patent may also be directly infringed even
22 though the accused infringer believes in good faith that
23 what it is doing is not infringement of the patent.

24 There are two types of direct infringement:
25 Literal infringement and infringement under the Doctrine of

1 Equivalents. ContentGuard has alleged a type of direct
2 infringement known as literal infringement.

3 In order to prove literal infringement of a patent
4 claim, ContentGuard must show by a preponderance of the
5 evidence that the accused product or method includes each
6 and every requirement of ContentGuard's asserted claims.

7 In determining whether an accused product or
8 method of Apple literally infringes one or more of the
9 asserted claims of this case, you must compare the accused
10 product or method with each and every one of the
11 requirements of the claim to determine whether the accused
12 product contains each and every requirement recited in a
13 claim.

14 A claim requirement is present if it exists in an
15 accused product or method just as it is described in the
16 claim language, either as I've explained the language to
17 you, or if I did not explain it, as would have been
18 understood by one of ordinary skill in the art.

19 If any of the accused products or method omit any
20 requirement recited in a claim, then you must find that
21 particular product or method does not literally infringe
22 that particular claim. Not all the claims of a patent must
23 be infringed for a patent to be infringed.

24 ContentGuard also alleges that Apple directly
25 infringes all of the asserted claims under the Doctrine of

1 Equivalents.

2 If a person makes, uses, sells, or offers to sell
3 within the United States a product or practices a method
4 which does not meet all the requirements of a claim and thus
5 does not literally infringe that claim, there can still be
6 direct infringement if that product or method satisfies that
7 claim under the Doctrine of Equivalents.

8 Under the Doctrine of Equivalents, a product or
9 method infringes a claim if the accused product or method
10 performs steps or contains elements corresponding to each
11 and every requirement of the claim that is equivalent to,
12 even though not literally met by the accused product or
13 method.

14 You may find that a step or element is equivalent
15 to a requirement of a claim that is not literally met if a
16 person having ordinary skill in the field of the technology
17 of the patent would have considered the differences between
18 them to be insubstantial or would have found that Apple's
19 action or structure (1) performs substantially the same
20 function (2) in substantially the same way (3) to achieve
21 substantially the same result as the requirement of the
22 claim.

23 In order to prove infringement by equivalents,
24 ContentGuard -- ContentGuard must prove the equivalency to a
25 claim element by a preponderance of the evidence.

1 In this case, the Plaintiff asserts that the
2 Doctrine of Equivalents applies in only -- excuse me.

3 In this case, Plaintiff asserts that the Doctrine
4 of Equivalents applies and is only applicable to the issue
5 of whether behavioral integrity exists on the iTunes servers
6 as among the claims in this suit.

7 ContentGuard also alleges that Apple has
8 indirectly infringed the asserted claims. There are two
9 types of indirect infringement: Inducing infringement and
10 contributory infringement.

11 ContentGuard alleges that Apple is liable for
12 indirect infringement by inducing another party or person to
13 directly infringe the following asserted claims literally:
14 Claim 1 of the '859 patent; Claim 1 of the '072 patent; and
15 Claim 7 of the '956 patent.

16 You must determine whether inducement has occurred
17 on a claim-by-claim basis.

18 Apple is liable for inducement of a claim if
19 ContentGuard proves by a preponderance of the evidence that:

20 (1) the acts are actually carried out by another
21 single Apple customer using the accused products or method
22 and those acts directly infringe that claim;

23 (2) Apple took action during the time the accused
24 patent was in force with the specific intent to cause and
25 did cause the infringing acts by Apple's customers;

1 And (3) Apple knew of the asserted patent at the
2 time of its action and knew that the acts, if taken by its
3 customers, would infringe the patent, or Apple was willfully
4 blind to the fact that by engaging in those acts, its
5 customers would commit infringement of the asserted patent.

6 To prove willful blindness, ContentGuard must
7 prove by a preponderance of the evidence that Apple believed
8 there was a high probability that Apple's customers were
9 directly infringing the asserted claims by engaging in acts
10 induced by Apple and that Apple took deliberate steps to
11 avoid confirming that high probability.

12 ContentGuard argues that Apple is liable for
13 contributory infringement by contributing to its own
14 customers' direct infringement of the following asserted
15 claims: Claim 1 of the '859 patent; Claim 1 of the '072
16 patent; and Claim 7 of the '956 patent.

17 You must determine whether there has been
18 contributory infringement on a claim-by-claim basis.

19 Apple is liable for contributory infringement of
20 an asserted claim if ContentGuard proves each of the
21 following by a preponderance of the evidence:

22 (1) Apple sold or offered to sell within the
23 United States a component for use in a product during the
24 time the asserted patent was in force.

25 (2) The component has no substantial,

1 non-infringing use.

2 (3) The -- the component constitutes a material
3 part of the invention.

4 (4) Apple was aware of the asserted patent and
5 knew that the product or processes for which the component
6 has no other substantial use would be covered by a claim of
7 the asserted patent or would satisfy a claim of the asserted
8 patent under the Doctrine of Equivalents.

9 And (5) that use directly infringes the asserted
10 claim.

11 If you find that the component or apparatus
12 ContentGuard accuses has any substantial use for any purpose
13 other than infringement, you should find that Apple is not
14 liable for contributory infringement.

15 In this case, ContentGuard contends that Apple has
16 infringed ContentGuard's patents and further that Apple
17 infringed them willfully.

18 Apple denies that it infringed or willfully
19 infringed any of the asserted claims.

20 If you decide that Apple has infringed, you must
21 address the additional issue of whether or not Apple's
22 infringement was willful.

23 Willfulness requires ContentGuard to prove by
24 clear and convincing evidence that Apple acted recklessly.

25 To prove that Apple acted recklessly, ContentGuard

1 must prove by clear and convincing evidence that Apple
2 actually knew or should have known that its actions created
3 an unjustifiably high risk of infringement of a valid
4 patent.

5 To determine whether Apple had this state of mind,
6 consider all the facts, which may include but are not
7 limited to the following:

8 (1) whether or not Apple acted in accordance with
9 the standards of commerce for its industry;

10 (2) whether or not Apple intentionally copied a
11 ContentGuard product that is covered by an asserted patent;

12 (3) whether or not there is a reasonable basis for
13 Apple to have believed that it did not infringe or had a
14 reasonable defense to infringement;

15 (4) whether or not Apple made a good-faith effort
16 to avoid infringing the asserted claims of the asserted
17 patents -- for example, whether it attempted to design
18 around the asserted -- the asserted ContentGuard patents;

19 And (5) whether or not Apple tried to cover up its
20 infringement.

21 None of these factors is alone determinative, and
22 this list of factors is not an exhaustive list of things you
23 should consider. Your determination of willfulness should
24 incorporate the totality of the circumstances based on the
25 evidence presented during the trial.

1 If you decide that any infringement was willful,
2 that decision should not affect any damage award that you
3 make. I will take willfulness into account later.

4 Apple has challenged the validity of the asserted
5 claims on a number of grounds. Patent invalidity is a
6 defense to patent infringement. Even though the Patent
7 Office Examiner has allowed the claims of a patent, you, the
8 jury, have the ultimate responsibility for deciding whether
9 the claims of the patent are valid.

10 I'll now instruct you on the rules you must follow
11 in deciding whether or not Apple has proven that the
12 asserted claims of the asserted patents are invalid.

13 An issued patent is accorded a presumption of
14 validity based on the presumption that the United States
15 Patent and Trademark Office acted correctly in issuing the
16 patent. To prove that any claim of a patent is invalid,
17 Apple must persuade you by clear and convincing evidence
18 that the claim is invalid.

19 Again, the ultimate responsibility for deciding
20 whether the claims of the patents-in-suit are valid is up to
21 you, the members of the jury.

22 Keep in mind, however, ladies and gentleman, that
23 everyone has the right to use existing knowledge and
24 principles. A patent cannot remove from the public the
25 ability to use what was known or obvious before the

1 invention was made or patent protection was sought.

2 I'll now explain to you Apple's grounds for
3 asserting invalidity of the claims of the asserted patents.
4 In making your determination as to invalidity, you should
5 consider each claim separately. Claims are construed the
6 same way for determining -- for determining infringement as
7 for determining invalidity.

8 In patent law, a device, method, publication, or
9 patent that predated the patent claims at issue is called a
10 prior art reference.

11 Prior art may include items that were publicly
12 known, in public use, or offered for sale before a certain
13 date. It may also include publications or patents that
14 disclose the claimed invention or elements of the claimed
15 invention.

16 In determining whether or not the invention is
17 invalid, you must determine the scope and content of the
18 prior art at the time the invention was made.

19 Prior art includes previous devices, articles, and
20 printed publications or patents that disclose the invention
21 or elements of the invention. You must decide what those
22 references would have disclosed or taught one of ordinary
23 skill in the field of technology of the patent at the time
24 the invention was made.

25 To qualify as a prior art reference, a printed

1 publication must be reasonably accessible to those
2 interested in the field, even if it's difficult to find. An
3 electronic publication, including online or Internet
4 publications, is a printed publication if it is reasonably
5 accessible to those interested in the field, even if it's
6 difficult to find.

7 The dates of ContentGuard's claimed inventions are
8 November the 23rd, 1994, for patent -- for the '859
9 patent -- excuse me -- the '85 -- yes -- the '859 patent,
10 the '956 patent, the '007 patent, and the '072 patent, which
11 you'll recall are referred to as the Stefik patents.

12 And November the 20th, 2001, for the '053 patent,
13 which you'll recall has been called the meta-rights patent
14 or the Nguyen patent.

15 The effective filing dates for the asserted claims
16 are the same.

17 The Defendant, Apple, contends that the asserted
18 claims of the asserted patents are invalid as being obvious.
19 Even though an invention may have -- may not have been
20 identically disclosed or described in a single prior art
21 reference before it was made by an inventor in order to be
22 patentable, the invention must also not have been obvious to
23 a person of ordinary skill in the field of the technology of
24 the patent at the time the invention was made.

25 Apple may establish that a patent claim is invalid

1 by showing by clear and convincing evidence that the claimed
2 invention would have been obvious to persons having ordinary
3 skill in the art at the time the claimed inventions were
4 made.

5 In determining whether a claimed invention is
6 obvious, you must consider the level of ordinary skill in
7 the field that someone would have had at the time the
8 claimed invention was made, the scope and content of the
9 prior art, and any differences between the prior art and the
10 claimed invention.

11 Keep in mind that the existence of each and every
12 element of the claimed invention in the prior art does not
13 necessarily prove obviousness. Most, if not all, inventions
14 rely on building blocks of prior art.

15 In considering whether a claimed invention is
16 obvious, you should consider whether there was a reason that
17 would have prompted a person having ordinary skill in the
18 field to combine the known elements in a way that the
19 claimed invention does, taking to account -- taking into
20 account such factors as:

21 (1) whether the claimed invention was merely the
22 predictable result of using prior art elements according to
23 their known functions;

24 (2) whether the claimed invention provides an
25 obvious solution to a known problem in the relevant field;

1 (3) whether the prior art teaches or suggests the
2 desirability of combining elements in the claimed
3 inventions;

4 (4) whether the prior art teaches away from
5 combining elements in the claimed invention;

6 (5) whether it would have been obvious to try the
7 combination of elements, such as when there is a design need
8 or market pressure to solve a problem, and there are a
9 finite number of identified predictable solutions;

10 (6) whether the change resulted more from design
11 incentives or other market forces.

12 To find that prior art rendered the invention
13 obvious, you must find that the prior art provided a
14 reasonable expectation of success.

15 In determining whether the claimed invention was
16 obvious, do not use hindsight. In other words, you should
17 not consider whether a person of ordinary skill in the art
18 would know now or what has been learned from the teaching of
19 the patent-in-suit.

20 The ultimate conclusion of whether a claim is
21 obvious should be based on your determination of several
22 factual issues, including:

23 (1) You should consider the level of ordinary
24 skill in the field of the invention that someone would have
25 had at the time the claimed invention was made under the

1 instructions that I've previously given you.

2 (2) You must decide the scope and content of the
3 prior art. In determining the scope and content of the
4 prior art, you must decide whether a reference is pertinent,
5 or analogous, to the claimed invention.

6 Pertinent, or analogous, prior art includes prior
7 art in the same field of endeavor as the claimed invention,
8 regardless of the problems addressed by the reference and
9 prior art from different fields reasonably pertinent to the
10 particular problem with which the claimed invention is
11 concerned.

12 (3) You must decide what difference, if any,
13 existed between the claimed invention and the prior art.

14 In making these assessments, you should take into
15 account any objective evidence, sometimes called "secondary
16 considerations," that may have existed at the time of the
17 invention and afterwards that may shed light on the
18 obviousness or not of the claimed invention, such as:

19 (1) whether the claimed invention was commercially
20 successful as a result of the merits of the claimed
21 invention, rather than the results of design needs or market
22 pressure, advertising or similar activities;

23 (2) whether the invention satisfied a long-felt
24 need;

25 (3) whether others had tried and failed to make

1 the invention;

2 (4) whether others invented the invention at
3 roughly the same time;

4 (5) whether there are changes or related
5 technologies or market needs contemporaneous with the
6 invention;

7 (6) whether the invention achieved unexpected
8 results;

9 (7) whether others in the field praised the
10 invention;

11 (8) whether persons having ordinary skill in the
12 art of the invention expressed surprise or disbelief
13 regarding the invention;

14 (9) whether others sought or obtained rights to
15 the patent from the patentholder.

16 (10) whether the inventor proceeded contrary to
17 accepted wisdom in the field.

18 If and only if you find that Apple infringed any
19 claim of the asserted patents and such claim is not invalid,
20 you must then consider the amount of damages to award to
21 ContentGuard.

22 I'll now instruct you on the measure of damages.
23 By instructing you on damages, I'm not suggesting which
24 party should win this case on any issue.

25 The damages you award must be adequate to

1 compensate ContentGuard for the infringement you find.

2 Damages are not meant to punish an infringer.

3 ContentGuard has the burden to establish the
4 amount of its damages by a preponderance of the evidence.
5 ContentGuard is not entitled to damages that are remote or
6 speculative.

7 ContentGuard seeks a reasonable royalty as the
8 measure of damages in this case. No more, no less.

9 A reasonable royalty is defined as the amount of
10 money ContentGuard and Apple would have agreed upon as a fee
11 for Apple's use of ContentGuard's inventions at the time the
12 infringement began.

13 ContentGuard must prove its damages with
14 reasonable certainty, but the determination of a damage
15 award is not an exact science and the amount need not be
16 proven with unerring precision.

17 While the damages may not be determined by mere
18 speculation or guess, it is proper to award a damages amount
19 if the evidence shows the extent of the damages as a matter
20 of just and reasonable inference.

21 I'll give you more detailed instructions regarding
22 damages shortly; however, if you find that Apple has
23 infringed any valid claim of the patents-in-suit,
24 ContentGuard is entitled to recover no less than a
25 reasonable royalty for each infringing sale or use of its

1 inventions by Apple.

2 A royalty is a payment made to a patentholder in
3 exchange for the right to make, use, or sell the claimed
4 invention.

5 A reasonable royalty is the amount of royalty
6 payment that a patentholder and the infringer would have
7 agreed to in a hypothetical negotiation taking place between
8 them at a time prior to when the infringement first began.

9 In considering this hypothetical negotiation,
10 ladies and gentlemen, you should focus on what the
11 expectations of the patentholder and the infringer would
12 have been had they entered into an agreement at that time
13 and had they acted reasonably in their negotiations.

14 In determining this, you must assume that both
15 parties believed the patents were valid and infringed and
16 the patentholder and the infringer were willing to enter
17 into an agreement.

18 The reasonable royalty you determine must be a
19 royalty that would have resulted from this hypothetical
20 negotiation and not simply a royalty either party would have
21 preferred.

22 Evidence of things that happened after the
23 infringement first began can be considered in evaluating the
24 reasonable royalty only to the extent that the evidence aids
25 in assessing what royalty would have resulted from a

1 hypothetical negotiation.

2 In determining a reasonable royalty, you should
3 consider all the facts known and available to the parties at
4 the time the infringement first began.

5 Some of the kinds of factors that you may consider
6 in making your determination are:

7 (1) the royalties received by ContentGuard for the
8 licensing of the patents-in-suit proving or tending to prove
9 an established royalty;

10 (2) the rates paid by Apple for the use of other
11 patents comparable to the patents-in-suit;

12 (3) the nature and scope of the license as
13 exclusive or non-exclusive or as restricted or
14 non-restricted in terms of territory or with respect to whom
15 the manufactured product may be sold;

16 (4) ContentGuard's policy of licensing its patents
17 rather than keeping its inventions to itself by refusing to
18 license others to use them;

19 (5) the commercial relationship between
20 ContentGuard and Apple, such as whether they are competitors
21 in the same territory, in the same lines of business, or
22 whether they are inventor and promoter;

23 (6) the effect of selling the patented specialty
24 in promoting sales of other products of the licensee, the
25 existing value of the invention to ContentGuard as a

1 generator of sales of its non-patented items, and the extent
2 of such derivative or convoyed sales;

3 (7) the duration of the patent and the term of the
4 license;

5 (8) the established profitability of the product
6 made under the patents, its commercial success, and its
7 current popularity;

8 (9) the utility and advantages of the patented
9 property over the old modes or devices, if any, that had
10 been used for working out similar results;

11 (10) the nature of the patented invention, the
12 character of the commercial embodiment of it as owned and
13 produced by ContentGuard, and the benefit to those who have
14 used the invention;

15 (11) the extent to which Apple made use of the
16 invention and any evidence probative of the value of that
17 use;

18 (12) the opinion and testimony of qualified
19 experts;

20 And (13) the amount that a licensor (such as the
21 patentee) and a licensee (such as the infringer) would have
22 agreed upon at the time the infringement began if both had
23 been reasonably and voluntarily trying to reach an
24 agreement; that is, the amount which a prudent licensee who
25 desired as a business proposition to obtain a license to

1 manufacture and sell a particular article embodying the
2 patented invention would have been willing to pay as a
3 royalty and yet be able to make a reasonable profit and
4 which amount would have been acceptable by a prudent
5 patentee who was willing to grant a license.

6 No one factor is dispositive, and you can and
7 should consider the evidence that's been presented to you in
8 this case on each of these factors.

9 You may also consider any other factors which, in
10 your mind, would have increased or decreased the royalty
11 Apple would have been willing to pay and ContentGuard would
12 have been willing to accept acting as normally prudent
13 business people.

14 For purposes of determining a reasonable royalty,
15 you should consider whether, at the time of the hypothetical
16 negotiation, Apple had non-infringing alternatives to taking
17 a license from ContentGuard.

18 A non-infringing alternative is a way of proving
19 the same or comparable functionality or achieving the same
20 or a comparable result that does not require using the
21 asserted claims.

22 The final factor establishes a framework which you
23 should use in determining a reasonable royalty; that is, the
24 payment that would have resulted from a negotiation between
25 the patentholder and the infringer taking place at a time

1 prior to when the infringement began.

2 The law requires that any damages awarded to
3 ContentGuard correspond to the value of ContentGuard's
4 alleged invention, not to the value of features of Apple's
5 products that are not covered by ContentGuard's asserted
6 patent claims. This is particularly true where the accused
7 products have multiple features and multiple components, as
8 in this case.

9 Accordingly, any reasonable royalty award must be
10 based only on the incremental value that ContentGuard's
11 patented invention adds to the -- Apple's accused products.

12 ContentGuard bears the burden to establish the
13 amounts attributable to the patented features; that is,
14 ContentGuard must give evidence tending to separate or
15 apportion between the patented components or features and
16 the unpatented components and features and such evidence
17 must be reliable and tangible and not conjectural or
18 speculative.

19 In determining the amount of damages, you must
20 take into account when damages begin and end. For each
21 asserted patent, no damages can be awarded for any
22 infringement that occurred before the date the patent was
23 issued or for any infringement that occurred more than six
24 years before ContentGuard sued Apple on December the 18th,
25 2013.

1 The date each patent was issued is in the chart
2 which will be included in these jury instructions and which
3 you will have, but just for the record, I will advise you
4 that the '859 patent was issued on November the 8th, 2005;
5 the '072 patent was issued on April the 21st, 2009; the '956
6 patent was issued on February the 5th, 2013; the '007 patent
7 was issued on March the 5th, 2013; and the '053 patent was
8 issued on August the 16th, 2010.

9 For each patent, you must determine the date that
10 Apple received actual notice of the patents and the specific
11 product alleged to infringe. Your job is to calculate
12 damages from the date that Apple received actual notice of
13 infringement by the products accused in this case.

14 ContentGuard bears the burden of proving by a
15 preponderance of the evidence that it provided actual
16 notice.

17 Actual notice means that ContentGuard communicated
18 directly to Apple a specific charge of infringement of the
19 patents by a specific accused product or device. For
20 purposes of actual notice, discovery of other models or
21 products related to those in the notice may bring those
22 products within the scope of the notice.

23 The filing of the complaint against Apple
24 qualifies as actual notice, so the damages period begins no
25 later than the date the complaint was filed in this case.

1 You should not award damages for any alleged
2 infringement by Apple occurring after each patent's
3 expiration date, which are as follows:

4 The '053 patent's expiration date is March the
5 5th, 2022;

6 The '072 patent's expiration date is November the
7 23rd, 2014;

8 The '859 patent expiration date is February the
9 5th, 2015 (sic);

10 The '007 patent expiration date is November the
11 23rd, 2014;

12 And the '956 patent expiration date is November
13 the 23rd, 2014.

14 Now, ladies and gentlemen, with those
15 instructions, we will now hear closing arguments from
16 counsel for each of the parties.

17 The Plaintiff may now present its first closing
18 argument to the jury.

19 Mr. Baxter, would you like a warning on your time?

20 MR. BAXTER: I would, Your Honor. If you would
21 let me know after 10 and then after -- after 18.

22 THE COURT: Yes, sir. I'll do that.

23 MR. BAXTER: Thank you, Your Honor.

24 THE COURT: You may proceed.

25 MR. BAXTER: Thank you.

1 May it please the Court.

2 Ladies and gentlemen, also, we can't thank you
3 enough for your patience and your attention for what seems
4 like a long time now. We hope that you have enjoyed at
5 least some of your service here and learned a lot, and we
6 have enjoyed bringing the case to you.

7 I think I told you when we started some now two
8 weeks ago that I had a freshman daughter in college. She is
9 from India and very shy. And I talked to her last night
10 because she was giving her first speech in college
11 yesterday, a persuasive speech, she told me.

12 And I called her to check and see how it went.
13 She told me: It went great.

14 And I said: That's good.

15 I told her I was going to give a persuasive
16 speech, I hope today.

17 And she said, Daddy, I've got a hint for you.

18 I said: What is it?

19 She said: I found, if you stick to the facts,
20 you'll do a lot better.

21 So I'm going to try to do that and stick to the
22 facts of what we've learned during these last couple of
23 days. And the first thing we learned is that, in fact, we
24 were going to hear a lot about trusted systems and secure
25 container.

1 And we told you that right up front, that we
2 thought they were going to try to pitch this case that there
3 was a trusted system that was Stefik but that they were a --
4 a secure container. And, in fact, they did it right from
5 the beginning.

6 And remember, they put this slide up in their
7 opening statement, and here's what they said: Apple's
8 FairPlay is the kind of DRM system that ContentGuard called
9 a secure container in its patent.

10 But there was a problem with that. And the
11 problem, of course, is that it wasn't true. And what
12 happened was that when you look at the rest of the quote
13 that we've looked at throughout this trial, here's what it
14 said.

15 It said that to actually have a secure container,
16 that a secure container does not provide any mechanism to
17 prevent legitimate users from obtaining the clear document
18 and then using and redistributing it in violation of the
19 content owner's intellectual property.

20 Now, that's what a secure container is. And Apple
21 does that. They absolutely do. Since 2009, that's how they
22 let their music get out to you over iTunes. There is no DRM
23 on their music after it comes to your iPhone or iPad. No
24 usage rights.

25 But for the items that we're talking about in this

1 case, movies and books and TV shows, they absolutely have
2 usage rights, and they absolutely do not do --

3 If you'll go back, Mr. Diaz, to that first slide .
4 -- what their lawyer told you in opening statement
5 they do, is that they have a DR -- DRM system that's called
6 a secure container. That is untrue.

7 Go forward, Mr. Diaz.

8 And we asked their engineer when he's up on the
9 stand -- you know what? I thought he was a pretty honest
10 fellow. And we said: So does FairPlay do what this author,
11 the author of the patent we just read to you, was describing
12 as the secure container approach?

13 He said: Well, FairPlay doesn't allow to do that
14 for movies. It does allow to do that for DM-free (sic)
15 books and DM-free (sic) songs. And there are a few books
16 and all of their songs. But for movies and TV shows and
17 almost all of their books, it's not true.

18 As a matter of fact, it was interesting. Remember
19 yesterday when I had their damage expert up on the stand,
20 and I read a portion of his expert report? It turns out he
21 had interviewed their infringement -- non-infringement
22 expert. Remember Dr. Kelly?

23 And I said: Well, you talked to Dr. Kelly.

24 And he said -- and he told you that there was a
25 non-infringing alternative to the patents-in-suit, and that

1 would be a DRM system using a secure container scheme
2 combined with Cloakware.

3 And the importance of that is a non-infringing
4 alternative means they're not doing it now.

5 So, apparently, before Dr. Kelly got the signal
6 that they were going to tell you in this trial that they
7 were going to do a secure container, he told their damage
8 expert: That's not what they do.

9 The truth came out. And, in fact, you've learned
10 throughout this trial that's exactly what they do not do.
11 They do not leave their movies and their TV shows out there
12 unprotected.

13 Well, let's talk a little bit about their
14 infringement. And you remember that the burden here is by a
15 preponderance of the evidence, and Judge Gilstrap told you,
16 if it tilts ever so slightly, if we prove ever so slightly
17 they infringe, then you must find infringement.

18 We're going to talk about the three integrities
19 and then the two other issues that are at issue here about
20 infringement.

21 Does Apple have physical integrity? Well, we know
22 that they do, because on the iPhone and the iPads, we know
23 that their content is stored encrypted, that they're
24 protected by account keys and that the Cloakware hides the
25 keys. And they do everything they can to make sure that

1 that information is protected, and they absolutely have
2 physical integrity.

3 Do they have communications integrity? Here's
4 what they do. They encrypt the content. They send it over
5 the encrypted pipeline. It's encrypted when it goes to
6 Akamai. It's encrypted when it ends up on your iPhone and
7 on your iPad, and it's sent over an encrypted network.

8 Of course they have communications integrity.
9 They do everything they can to do that, and that's a
10 checkmark on that.

11 Well, do they have behavioral integrity? Here's
12 what the Apple document says. To ensure that all apps come
13 from a known and approved source and have not been tampered
14 with, iOS -- that's their operating system -- requires that
15 all executable code be signed using Apple-issued
16 certificate.

17 Now, that's what they printed and gave to the
18 world; that if you're going to have -- Apple-issued
19 certificates are going to be required for all executable
20 code, which is the code that comes down to your phone and
21 your iPad.

22 Of course, they have certificates that come down
23 to your phone, and they have to put it in writing, and they
24 did.

25 Well, the fight -- it turned out to be on their

1 servers, and we finally learned that the last hop of all the
2 updates is over a system using rsync and using SSH, which is
3 a pipeline that is secure and encrypted.

4 And you heard Dr. Martin tell you uncontradicted
5 that before they can send those updates over that secure
6 line, they have to send a digital certificate. The whole
7 purpose of this digital certificate is to make sure that the
8 person that gets it can trust the person that sends it.
9 That's the whole purpose.

10 And that's exactly what Apple does, and they
11 absolutely have behavioral integrity.

12 The next issue, of course, is usage rights. Do
13 they, in fact, have usage rights? They at one point told
14 you they didn't have it. Well, that didn't last very long.

15 Once Dr. Tribble got on the stand, he said: Of
16 course we have usage rights.

17 Once Mr. Fasoli got on the usage rights -- on the
18 stand, he said: Of course we've got usage rights. He said:
19 Rules and usage rights are exactly the same thing. That's
20 how Apple looks at it.

21 And if you look at the face of their phone, they
22 absolutely have usage rights. You can tell -- and we looked
23 at their screenshot -- that they have usage rights right on
24 the front of it.

25 I said: What's this black triangle?

1 He says: It's a manner of use.

2 I said: What's this 23 hours? Is that a hint?
3 Is that a suggestion?

4 He said: No. It's absolutely a usage right that
5 is placed on the phone because the movie producers say it's
6 got to be there.

7 Remember we did the demonstration?

8 May I have the ELMO, please, ma'am?

9 If you were to take this iPad and you were to put
10 it as we did with a movie on it, and I would just hit the
11 movie and ask it to play, it's going to ask me: Do you want
12 to rent this movie?

13 And I say: Okay. And it's going to come up and
14 let me rent the movie with all the usage rights right there
15 on the movie. That's what it does. It won't let me play
16 this movie unless the usage rights are on it.

17 And that's how it's set up. It will not work any
18 other way. Of course it's got usage rights, and we
19 presented that to us.

20 All right. Let's talk about meta-rights just a
21 moment.

22 We didn't talk a lot about meta-rights during the
23 trial, but here's what it consists of. Meta-rights are
24 patents that allow you to share among the family members.
25 It's called the sharing rights patents.

1 THE COURT: Ten minutes have been used.

2 MR. BAXTER: Thank you, Your Honor.

3 These patents, we only had one of them.

4 Let's go to the next one.

5 And it allows the studios to set the meta-rights.

6 And you saw Dr. Martin, when he got on the stand, fill out
7 the chart. The chart that the movie studios sends to Apple,
8 that's how it works.

9 Now, remember there wasn't even a validity
10 challenge to this. They didn't have a single word to say
11 about it. Absolutely nothing. And that's how the patent
12 works, and that's exactly how it works in the Apple system.

13 Well, there are certain excuses that Apple has,
14 and you've heard about all of these.

15 And the first one is they said: Well, there's no
16 physical integrity because you can get access to
17 information. And here's what they pointed to. You could
18 get an encrypted file.

19 Now, the question is when the patent says that
20 you're going to have physical integrity if you protect the
21 information. My question to you is: If that's To Kill a
22 Mockingbird, and that's all you can get right there, did you
23 get information?

24 And the answer to that is: No, you didn't.

25 And that excuse simply doesn't work. And that was

1 their sole excuse about why they didn't have physical
2 integrity, because they said: Well, every once in a while,
3 we could get an encrypted file. But you didn't get
4 information. You got an encrypted file. And that doesn't
5 work.

6 Well, then they said: Wait a minute. There's a
7 communication integrity problem, because you can -- you --
8 you can't get the communication because you're going up to
9 the Akamai server, and that isn't safe.

10 And we asked their engineer: Now, as far as
11 FairPlay is concerned, FairPlay has -- from FairPlay -- from
12 FairPlay's point of view, Akamai is not relevant to how
13 Apple's DRM system protects content; is that true?

14 And he says: That is correct.

15 So when you start hearing a lot of excuses about,
16 well, we're going to communicate with FairPlay, what does
17 their engineer say? It's not relevant. As far as how
18 FairPlay protects Apple's content, it simply doesn't matter.

19 Well, what's the next excuse? The next excuse
20 they said was: Wait a minute. On that behavioral
21 integrity, you've actually got to stick the certificate
22 inside the software disk because it said "included."

23 And I thought that probably Dr. Goodrich had the
24 best example I had heard lately of batteries included. If
25 batteries are included and you put them in the box, that's

1 exactly what the language of that claim said.

2 And the Judge says, if he didn't define it, you're
3 to use the plain meaning. And the word "included" is not
4 defined. You're to use the plain meaning.

5 And what it says is: If you include it, which
6 means that you send it ahead of the content that you're
7 trying to make sure is, you're telling the server, this is,
8 in fact, trusted material, then that's exactly what they do.
9 They send it ahead. They say what's coming behind is
10 trusted; it comes from Apple.

11 And remember the whole purpose of that is to tell
12 the receiver it's coming from a trusted source. And what do
13 they do? Uncontradicted, they send a digital certificate up
14 that SSH line ahead of the content, ahead of the software.
15 And that's exactly how it's done, and they have behavioral
16 integrity.

17 Well, then the next one is on the usage rights.
18 Is it attached or treated as attached? And remember we got
19 out the little key fob, and we said: Well, there's two ways
20 you could think about this.

21 You can take the key, and you can put it in the
22 car and turn it, and it's attached, or I can hit the open
23 button from 25 feet away or a hundred feet away, and it
24 sends a signal, and it does the same thing. It opens the
25 door, and it's treated as attached.

1 And we heard their expert yesterday say: Well,
2 when I read it -- that is the expert -- even though it's got
3 the word "or" in there, it means exactly the same thing.

4 Can I see my airplane slide, Mr. Diaz?

5 You know, it says if you, for example, were going
6 to take -- figure out how to get from Dallas to Atlanta, you
7 could fly or you could take the train. And somehow even I
8 remember from English in high school that "or" and "and"
9 don't mean the same thing. They mean exactly the opposite.

10 So when Judge Gilstrap said it's attached or
11 treated as attached, he meant two different things.
12 Otherwise, it would have been redundant. It would have
13 meant the same thing. He wouldn't have said to say it.

14 And, therefore, when it's treated as attached,
15 that means it doesn't have to travel with it. Nowhere --
16 nowhere in those claims does it say that the usage rights
17 have to travel with the content. Absolutely noplacement. It
18 does not.

19 Let me tell you where it makes a difference. When
20 it's on the phone and it's time to watch the movie, then
21 those usage rights are treated as attached, and that's why
22 you're allowed to watch the movie. If they're not there,
23 you can't watch it.

24 And every Apple witness said that was true. If
25 they're not downloaded, if they're not there, if they don't

1 come down to your phone, if they don't come in that purchase
2 response, if they don't come down, you can't watch the
3 movie.

4 And they sit on your phone waiting for the content
5 to be accessed; that is, for you to press the play button or
6 the read button. And that's when they spring into action,
7 and they're treated as attached. There simply is no
8 question about that. That's actually a silly response for
9 them to say.

10 Well, what about validity? They only had validity
11 about the Stefik patents. Remember, that's clear and
12 convincing; that it's somewhere just short of reasonable
13 doubt, beyond a reasonable doubt, and the patents are
14 presumed to be valid.

15 Well, here's why, and you heard Dr. Goodrich talk
16 about this. Here's why those two references don't make
17 those patents invalid. There's no trusted repository.
18 There's no behavioral integrity. There's no communication
19 integrity. There's no usage rights enforced by a
20 repository. And there simply was no rebuttal to that from
21 Apple.

22 Next slide.

23 These two patents, you'll see right on the face of
24 them -- in fact, all four patents, the Dyad was considered
25 by the Patent Office, and they didn't combine it with

1 anything else, and they didn't see anything wrong with it.

2 But here's the most compelling part, if you ask
3 me. The Patent Office said that Dr. Stefik was the Father
4 of DRM. They didn't have any problem with this.

5 And here's the problem with Dr. White. Even
6 after -- even after the Stefik patents came out, five years
7 later, in 1999 while at IBM, he's still putting out a
8 product that doesn't work. Even he didn't combine it. He's
9 saying it would be obvious to a person skilled in the art,
10 and he didn't do it.

11 So it's hard to understand exactly how it is he
12 claims that a person of ordinary skill in the art would do
13 it when, in fact --

14 THE COURT: 18 minutes. 18 minutes, Mr. Baxter.

15 MR. BAXTER: Thank you, Your Honor.

16 -- he wouldn't do it.

17 Now, ladies and gentlemen, there simply can't be
18 any question that the Apple system is not using the secure
19 container. That is not what they're doing. And they
20 thought that it would be confusing to you and maybe you
21 would go off on the rabbit trail of, well, they're using a
22 totally different system. It's this secure container
23 system.

24 But, remember, when they get up here and talk to
25 you about this secure container, here's what they've got to

1 talk to you about.

2 At the end of the day, that system has to put all
3 of the content in the clear so that the user, that is me and
4 you, when we have it on our phones, can give it to anybody
5 we want to, and they can read it or play it or listen to it
6 or do anything they want.

7 And it will be interesting to see how they're
8 going to explain how the music has one system, DRM-free
9 music, but their contracts with the movie companies and the
10 book publishers says they absolutely cannot do that, and if
11 they did, their contracts are void, and they can't get
12 another movie, and they can't get another book.

13 So see how they're going to explain to you that
14 they're using the secure container approach when, in fact,
15 their own engineer said they absolutely do not do that.
16 They can't do it. And the movie companies won't let them do
17 it.

18 I'm going to get to come back in a few minutes,
19 ladies and gentlemen, and explain to you about damages, talk
20 to you about any confusion that Apple may have brought up
21 during their speech, and I'll look forward to talking to you
22 then.

23 Thank you, Your Honor.

24 THE COURT: All right. The Defendant may now
25 present its closing argument to the jury.

1 MR. PRITIKIN: Your Honor, may we approach for a
2 moment before I begin?

3 THE COURT: You may.

4 (Bench conference.)

5 MR. PRITIKIN: Mr. Baxter did not fully open. He
6 did not cover the subject of damages.

7 And, you know, I know courts do these things
8 differently, but my impression would be that he ought to be
9 fully opening on the topics that he's going to address in
10 the remainder of his time; otherwise, there's a little
11 sandbagging that's involved in it. He shouldn't be allowed
12 to come back and talk about --

13 THE COURT: The practice in this court is to
14 require him to use at minimum half of his time in his first
15 opening -- his first closing statement, but there's not a
16 substantive requirement in the practice here that he touch
17 every topic.

18 MR. PRITIKIN: That's fine. Just want to be clear
19 on that, Your Honor. Thanks.

20 THE COURT: All right. Let's proceed.

21 MR. BAXTER: Thank you, Judge.

22 (Bench conference concluded.)

23 THE COURT: Mr. Pritikin, would you like a warning
24 on your time?

25 MR. PRITIKIN: I would, Your Honor. Could I have

1 a warning at -- when I have 15 minutes left and then again
2 at 2?

3 THE COURT: 15 and 2, yes, sir.

4 All right. You may proceed with your closing
5 argument to the jury.

6 MR. PRITIKIN: Good morning, ladies and gentlemen.
7 On behalf of Apple, I do want to thank you again for your
8 time and attention over the last week-and-a-half. We
9 understand and are aware of the sacrifices that you make to
10 be here as jurors, and I want you to know that all of us on
11 our trial team appreciate that.

12 In my opening statement last week, I told you that
13 Apple does not infringe ContentGuard's patents. Now, I'm
14 going to try to focus, in the time that I have with you this
15 morning, on the facts that I think are going to be helpful
16 to you in trying to answer the questions on the verdict
17 form.

18 I said at the beginning that there are two basic
19 DRM systems: The secure container and the trusted system.
20 And there's no dispute in the case that ContentGuard
21 patented a form of the trusted system. Apple's FairPlay
22 uses the secure container approach. And it's not what
23 ContentGuard patented.

24 Even though ContentGuard has the burden of proving
25 infringement in the case, we actually brought you the

1 evidence to show that Apple does not infringe, including
2 knowledgeable engineers like Mr. Fasoli and Mr. Ward, who
3 came to Marshall to explain to you how Apple's DRM system
4 works.

5 No witness from ContentGuard suggested that Apple
6 ever at any time copied anything from ContentGuard.

7 Now, I asked you to pay careful attention to the
8 things that ContentGuard said before the lawsuit and to
9 compare that with what ContentGuard says in the courtroom
10 during the trial.

11 At the time it was getting its patents,
12 ContentGuard said that there were two fundamentally
13 different ways to do DRM and that its locked-down trusted
14 system would not work very well if customers could buy
15 merchandise on computers like Macs and PCs. But in this
16 lawsuit, they're saying really just the opposite.

17 Now, by contrast, Apple's documents show that as
18 long ago as 2005, it was not interested in a
19 ContentGuard-type system, and that's the same thing we're
20 saying in the courtroom here today. Steve Jobs wrote in
21 2005, let's not use this DRM, referring to a complicated
22 system of attached usage rights.

23 We showed you the OMA system that's referred to
24 and the article attached to Mr. Jobs' email. And that
25 article also included a quote from ContentGuard that its

1 patents covered the complicated system that Mr. Jobs was
2 rejecting.

3 Dr. Tribble explained to you when he testified why
4 Apple didn't want to use that sort of system that's
5 referenced in Mr. Jobs' email. And this document is from
6 2005, ten years ago, long before this lawsuit, and it was
7 written in the ordinary course of business.

8 When ContentGuard contacted Apple over the years,
9 Apple wrote back and explained why it didn't use the
10 patents. Apple didn't use Stefik's trusted system then, and
11 it's not using it today.

12 Apple uses encryption and keys to control the use
13 of digital works, and those are the critical elements of the
14 secure container approach: Encryption and keys. Apple does
15 not use trusted repositories. It doesn't have usage rights
16 that are attached or treated as attached to the digital
17 works. And it's really as simple as that.

18 Apple wanted a DRM system that was going to be
19 simple for users. Otherwise, people wouldn't pay 99 cents
20 for songs. They'd just keep getting them from CDs and from
21 these illegal sites.

22 It was also important to Apple that its DRM system
23 could be used on many different kinds of devices and
24 computers, including Macintosh computers made by Apple and
25 PCs over which Apple had little or no control.

1 It did not want to restrict iTunes to
2 ContentGuard-type repositories and make people have those.
3 And it needed to work on the Windows PCs because those were
4 and still are the most widely useable personal computers.

5 And Apple couldn't control Windows. That's
6 controlled by Microsoft that makes the Windows operating
7 system.

8 As Dr. Tribble explained, Apple had to strike a
9 balance between the need for DRM on the one hand and making
10 it convenient for customers on the other. But you don't
11 have to take my word for it, and you don't have to take
12 Dr. Tribble's word for it.

13 You saw the deposition testimony of Michael Miron
14 who served as ContentGuard's CEO, and he testified that the
15 reason Apple's iTunes succeeded is that Apple got that
16 balance between a DRM system that's too strict and customer
17 use and convenience that they got it right.

18 Can we take that clip, Mr. Simmons?

19 (Video clip played.)

20 ANSWER: Protected content can be intrusive. I
21 think it's intrusive considering we don't use it. I think
22 the general reaction and the marketplace adoption indicated
23 that iTunes really did get that balance right, at least at
24 lunch.

25 Hence, consumers love the convenience of digital

1 content. And the design folks at Apple who are pretty good
2 at this stuff figured out a way to make that not intrusive.
3 And I think that was the point of this, if I remember. And
4 I remember being impressed with iTunes, too, that somebody
5 finally got the balance right.

6 (End of video clip.)

7 MR. PRITIKIN: Now, the trusted system approach in
8 the ContentGuard patents is heavy-handed, and it's not
9 surprising that it's heavy-handed.

10 As Dr. Stefik testified, the idea, the inspiration
11 for it originated in the United States military in systems
12 that were used to protect the government's most classified
13 information. And they didn't carry over very well to the
14 world of Internet merchandising.

15 When you go through ContentGuard's infringement
16 case piece by piece, you can understand why the patent
17 claims don't match with what Apple does.

18 Now, we've looked at this next slide several
19 times, but it serves as a good reminder. If you find that
20 any claim element is missing in Apple's DRM system, there's
21 no infringement.

22 Let me give you one simple example.

23 Let's put up the next slide.

24 One of the claim requirements is that software has
25 to include a digital certificate in order to be installed on

1 the DRM servers. It has to be in the software.

2 That's what the word "include" means, the software
3 "includes" the digital certificate. Those are the words
4 we're obligated to follow, and that's behavioral integrity.

5 Mr. Fasoli and Mr. Ward came to Marshall and told
6 you that there are no digital certificates included in the
7 software that is installed on Apple's FairPlay servers. The
8 FairPlay servers do not require software to include digital
9 certificates in order to be installed.

10 You heard Mr. Baxter just tell you that Mr. Fasoli
11 is a pretty honest fellow. And those are the determinations
12 you have to make for yourselves.

13 ContentGuard's source code expert, Dr. Smedley,
14 agreed on the stand. And all by itself -- all by itself
15 that means that it ends this case because none of the claims
16 are infringed if the FairPlay servers don't require that the
17 software installed on them include digital certificates.

18 Well, let's go back to the various claim
19 requirements, and we'll start with repositories. This slide
20 highlights in blue all of the places in the claims where
21 repositories are required. They're in every claim.

22 And that means that all of the servers and
23 computers and devices that touch the digital works have to
24 maintain the three integrities to be repositories in support
25 of usage rights. And far from being able to prove that they

1 all are, ContentGuard can't prove that any of them are.

2 There are seven different servers, computers, and
3 devices that you heard about and that are involved with
4 iTunes and FairPlay. For Apple to infringe the claims of
5 any of these patents, ContentGuard has to prove that every
6 one of these meets all of the three requirements of the
7 integrities in support of usage rights: Physical integrity,
8 communications integrity, behavioral integrity.

9 Let's start with the Macintosh computers and the
10 PCs, the general purpose computers, on which users can
11 access iTunes and get movies and books.

12 ContentGuard didn't come close to proving that
13 these qualify as repositories. You didn't hear any
14 testimony from ContentGuard's experts that Macs and PCs meet
15 the three integrities.

16 You heard Dr. Kelly explain why they lack physical
17 integrity of the kind that's defined by the Court.

18 And you heard Dr. Tribble testify that when
19 designing FairPlay, Apple knew that general purpose
20 computers don't require software to include digital
21 certificates to be installed.

22 People wouldn't want that. They don't want that
23 on their general purpose computers. They want to decide for
24 themselves what software they can put on to their PCs.

25 And it wouldn't be practical to design a system on

1 which Macs and PCs had to require digital certificates. But
2 this was a key part of iTunes, that it would work on all of
3 these general purpose computers.

4 But you don't, again, have to take our word for
5 it. You can look at the patent itself.

6 Let's look at the '053 patent, one of the
7 patents-in-suit, and this patent says that general purpose
8 computers are not repositories and would have to be
9 significantly redesigned to be repositories.

10 Well, that never happened. And ContentGuard
11 didn't offer any proof that this happened, that there was a
12 major redesign of PCs, general purposes computers, to turn
13 them into repositories.

14 Now, this patent was filed in 2004, and it issued
15 in 2011. And these statements are binding on ContentGuard.
16 They never went back to the Patent Office and said: There's
17 a mistake in this patent. Let's change these words. We got
18 it wrong.

19 ContentGuard has utterly failed to produce
20 evidence, let alone meet its burden of proof, that Macintosh
21 computers and PCs meet the requirements of repositories,
22 because they just don't.

23 Now, what does that mean? Does that mean that you
24 can just chop off the Macintosh computers and the PCs and
25 find that everything else uses the patents and reduce the

1 damages, as Mr. Thomas suggested at one point during the
2 trial? No, it does not mean that.

3 Because ContentGuard has failed to prove that
4 Macintosh computers and PCs are repositories, the whole
5 house of cards comes falling down. And let me tell you why.

6 Communications integrity requires that a
7 repository communicate only with other repositories in
8 support of usage rights.

9 Now, since Macintosh computers and PCs are not
10 repositories, then none of the other things that communicate
11 with them in the DRM system are themselves repositories.

12 Remember, that was the basic premise of the Stefik
13 patents, that the repositories communicate only with other
14 repositories when they're dealing with the digital content
15 and the use of it.

16 We know that the Apple servers communicate with
17 Macs and PCs, as do the Akamai servers. We know that iPads
18 can be used to sync their movies and books with these
19 general purpose computers.

20 And that means that ContentGuard's failure to
21 prove that the Macs and the PCs are repositories is fatal to
22 the entire case. It means that none of the other devices
23 and servers that communicate with the Macs and the PCs with
24 respect to the digital content meet the repository
25 requirements, so none of them are.

1 One untrusted device in the Stefik system infects
2 all of the others, and the other devices and computers then
3 don't qualify as repositories.

4 The failure of proof on the Macs and the PCs all
5 by itself, all by itself is enough to find that there is no
6 infringement of any of the patents in the case.

7 Well, what about the FairPlay servers? We know
8 about the software updates for the FairPlay servers do not
9 include digital certificates and that Apple doesn't require
10 them.

11 Again, that ought to be the end of the case all by
12 itself. All of the Apple witnesses, the engineers who
13 designed and maintained the system, compared that -- you
14 heard it from Dr. Tribble, from Mr. Fasoli, from Mr. Ward.

15 And even, again, ContentGuard's own expert,
16 Dr. Smedley, admitted that he couldn't identify any digital
17 certificates there.

18 ContentGuard's expert, Dr. Goodrich, tried to
19 confuse things. He said that some of the updates to the
20 FairPlay servers are transmitted over a secure
21 communications channel and talked about digital certificates
22 that are used to set up the channel and tried to confuse you
23 with that.

24 But the basic problem was that he was double
25 counting. He had already said that the secure

1 communications channel showed that there is communications
2 integrity. And then he looked around and he was trying to
3 find something that he could say is behavioral integrity.
4 He couldn't find it because it's not there. So he went back
5 and he counted the secure communications channel again.

6 But there are three integrities, not two. He
7 can't use the same thing over again because he admitted that
8 communications integrity and behavioral integrity are
9 different. They're not the same. And he can't use the same
10 thing for both. He's missing something, and he's missing
11 something to show that there was behavioral integrity.

12 FairPlay servers don't require software to include
13 digital certificates, and it's as simple as that. And if
14 you agree, that, too, by itself is the end of the case.

15 What about the iTunes servers? Again, the
16 testimony of all of the Apple engineers was that the iTunes
17 servers don't require digital certificates, and Dr. Smedley,
18 again, didn't say there was anything wrong with that.

19 So what did Dr. Goodrich do? Again, he double
20 counted by using the secure communications channel both for
21 communications integrity and for behavioral integrity.

22 Now, for the iTunes servers, Dr. Goodrich also
23 relied on something called the Doctrine of Equivalents, and
24 that's only relevant to the iTunes servers in this case as
25 you heard in Judge Gilstrap's instructions.

1 When a plaintiff can't prove their case of literal
2 infringement and they can't meet the claim requirements,
3 they sometimes fall back on the equivalents argument. It's
4 basically an admission that the actual claim requirements
5 are not met.

6 There is nothing in the Apple system that is
7 equivalent to requiring software that is used in updates to
8 the iTunes servers to include digital certificates because
9 they simply don't.

10 And what about the Akamai servers? All of the
11 experts on both sides agree that the Akamai servers are not
12 repositories under ContentGuard's patents. So the dispute
13 for infringement is whether they need to be repositories.
14 And the answer is that they do.

15 Now, Apple has no reason to require that those
16 repository -- that the Akamai servers be repositories. The
17 system works fine without them being repositories. That's
18 what the testimony said that you were shown.

19 But there can't be infringement unless those
20 Akamai servers are repositories. They're directly involved
21 in the distribution of movies, books, and music. They're
22 communicating with other commuter -- computers and devices
23 that need to be repositories in connection with the content.

24 If we look at the patent, again, they run away
25 from the language of the patent, but the patent tells us

1 that content is stored in repositories.

2 In the Apple system, it's stored in the Akamai
3 servers, and they're not repositories.

4 And what about Dr. Stefik and Dr. Goodrich? They
5 agreed that the content, the digital works, have to be
6 stored in repositories. So there's no dispute that the
7 content is stored on the Akamai servers.

8 So how do they try to get around it? Well,
9 Dr. Goodrich showed you a slide, and I think we saw it again
10 a few minutes ago, that tried to depict the Akamai servers
11 as routers on the Internet.

12 Now, routers on the Internet are kind of like the
13 plumbing on the Internet. Those are all the computers out
14 on the Internet that things get channeled through.

15 But he admitted on cross-examination that the
16 Akamai servers are not part of the Internet plumbing, even
17 though they're shown that way on this drawing which is
18 misleading in that respect.

19 And you really have to wonder why he was trying to
20 confuse things when he prepared this slide that purported to
21 show the Akamai servers as just part of the Internet
22 plumbing when he knew they were not.

23 Because the Akamai servers are not repositories,
24 again, all by itself, that's the end of this case, because
25 they have to be or none of the patent claims are infringed.

1 There's another reason why the devices and the
2 computers on which the content is viewed are not
3 repositories. Apple does not require that books and movies
4 that are downloaded and installed by users include digital
5 certificates. And every witness in the case who was asked
6 about it agreed that the books and the movies can
7 potentially contain viruses.

8 Dr. Smedley agreed that the iPhones and the iPads
9 do not require movies and books to include digital
10 certificates in order to be installed. And Dr. Kelly
11 explained to you that this means that they are not
12 repositories.

13 Now, you heard Dr. Goodrich try to explain this
14 one away by arguing the digital movies and books are not
15 software, that they're not software and, therefore, they
16 don't have to include digital certificates. Again, that's
17 not consistent with the patents. They're running away from
18 the language of the patents.

19 What the patents say, to the contrary, is that the
20 digital works, like video and audio recordings, are
21 software. The patent tells us that explicitly. So the
22 movies and the books need to include digital certificates if
23 you're using these patents, but they don't, and that's
24 another reason why there's no infringement.

25 Now, Mr. Baxter told you that apps that are

1 downloaded -- he showed you a slide on this -- to iPhones
2 and iPads are -- contain digital certificate. Again,
3 they're trying to confuse you. The apps are not accused of
4 infringement in this case.

5 And the problem is the books and the movies,
6 because all of the software that are downloaded have to
7 include digital certificates, and they don't. Again, all by
8 itself, this one aspect of it dooms ContentGuard's case.

9 Now, I want to turn next to the second critical
10 element of the ContentGuard patent claims which are the
11 usage rights that have to be attached or treated as attached
12 to the digital works.

13 And the patents, we know that usage rights are
14 attached to the digital works when they're put into the
15 first repository. And that way all of the later -- the
16 downstream repositories that get the digital works get the
17 usage rights, too, so they know what they can do with them.
18 And the usage rights are enforced by the repositories.

19 In Apple's system, of course, there are
20 restrictions on what users can do with the content. That is
21 a false issue. Of course, there are restrictions on what
22 they can do with it. But Apple doesn't enforce them with
23 usage rights that are attached or treated as attached to
24 movies and books.

25 In Apple's FairPlay system, it's the keys that

1 indicate the manner in which you can use the movies and
2 books. And in particular, you need an account key to view
3 purchased content, and you need a rental key to be able to
4 view a rented movie. It's the hallmark of the secure
5 container.

6 The rental key is what controls how long you can
7 watch the movie, the duration. All of the witnesses on both
8 sides who were asked about this agreed that without the
9 account or the rental key, it is impossible to view content.

10 Now, this is one of the most important points in
11 the whole case, and I want you to remember it when you
12 deliberate and to think about it.

13 Not a single witness for ContentGuard testified in
14 this courtroom that the account key or the rental key is a
15 usage right. Dr. Goodrich never said that the account and
16 the rental keys are usage rights nor did Dr. Martin nor did
17 Dr. Smedley. But those are the things in the Apple system
18 that are used to control what people can do.

19 Now, that was not a mistake or an oversight. And
20 there are two reasons why ContentGuard did not want to argue
21 to you that the account and the rental keys are usage
22 rights.

23 First, if they tried to read the patents in that
24 way, they knew the patents would be invalid because the use
25 of keys to control decryption and the use of content was out

1 there before Dr. Stefik.

2 And second, we know that the account and the
3 rental keys cannot be sent with the movies, so they couldn't
4 be regarded as attached. They can't be sent with movies
5 when they're transferred from one Apple device to another.

6 You remember yesterday, we looked at this contract
7 from Sony -- between Sony and Apple. And the contract
8 prohibits Apple from transferring account keys with movies.
9 It actually says you cannot transfer the account key with
10 the encrypted movie file.

11 So ContentGuard knew that it would never be able
12 to prove that account keys were attached or treated as
13 attached to the digital work. They were desperate to find
14 something they could say was a usage right and that's
15 attached or treated as attached to the digital work.

16 Now, remember, a usage right has to include, under
17 the Court's construction, a manner of use, and that's how
18 the work can be used.

19 In the end, Dr. Goodrich identified just two
20 things that he said were manners of use and the critical
21 part of the usage right, and that's kind of what his whole
22 argument came down to, two fields of information that are
23 sent to a user's device in a purchase response when they buy
24 or rent a movie or book.

25 You heard quite a bit about these two pieces of

1 information. One is the "kind" field, and the other is the
2 "isRental" field.

3 Now, remember that usage rights have to be
4 enforced by repositories. They don't just sit there. They
5 have to do something. And they have to enforce or control
6 playback. They have to permit the playback or control it in
7 some way.

8 When ContentGuard was presenting its case,
9 Dr. Goodrich and Dr. Smedley testified that these two fields
10 are enforced and are used in FairPlay to control or permit
11 the playback of movies.

12 You may remember, Dr. Smedley showed you
13 confidential Apple source code. It was on green paper that
14 he said was used for that purpose. Dr. Goodrich's
15 conclusions were based on what Dr. Smedley told him. And so
16 he had no independent way of knowing how the source code
17 worked.

18 Well, it turned out that Dr. Smedley made a
19 mistake. The information in those two fields does not
20 control whether the content can be viewed. It's there for
21 entirely different reason.

22 Mr. Fasoli, who is more familiar with the Apple
23 code, showed you the same source code. And he testified
24 that the fields that Dr. Smedley had pointed to are not used
25 to control or permit the playback of the movie.

1 Mr. Fasoli testified about the "kind" field, and
2 he testified about the "isRental" field. The information in
3 those fields is used to organize the things you buy for
4 convenient display. Books are with books. Rentals are with
5 rentals.

6 That is not DRM. That has nothing to do with
7 ContentGuard's patents, which involve controlling or
8 restricting whether you can view it or play it.

9 THE COURT: Fifteen minutes remaining, Counsel.

10 MR. PRITIKIN: Thank you, Your Honor.

11 Mr. Fasoli testified that you can even delete the
12 information in those fields, and you could still play the
13 movie or read the book.

14 Now, ContentGuard never brought Dr. Smedley back
15 in its rebuttal case to explain the mistake he had made.

16 In the rebuttal case, Dr. Goodrich finally
17 admitted that those fields are just used for presentation
18 and organization, not for controlling whether you can watch
19 the movie or read the book. And, again, at that point,
20 ContentGuard's case collapsed.

21 The things that ContentGuard pointed to and that
22 they argued are usage rights are not usage rights at all.
23 The use of content in FairPlay is controlled with the
24 account and the rental keys. And ContentGuard has never
25 contended that those keys are usage rights.

1 What this shows is that Apple's system is just
2 fundamentally different from the way the ContentGuard
3 patents work. And the ContentGuard patents can't be
4 stretched or twisted or manipulated to cover FairPlay.

5 Even if the purchase response included usage
6 rights, the information that Dr. Goodrich pointed to is not
7 attached or treated as attached to the books and movies.

8 What does attached or treated as attached mean?
9 In the digital world, you may be familiar with email
10 attachments. And if you send an email, the attachment
11 starts out and goes along with it.

12 And they stay together so that they're attached or
13 treated as attached. And that's what you talk about in the
14 digital world, which is what we're dealing with here.

15 In contrast, if you have two files that are saved
16 on your computer, they're not attached or treated as
17 attached because -- simply because they're on the same
18 computer.

19 With FairPlay, we know you can transfer a movie
20 from one computer to another, and there are no rights that
21 go along with it. They're not attached or treated as
22 attached.

23 Dr. Goodrich agreed that a mere association or a
24 reference from a digital work to the rights is not enough.
25 And in the end, that's all he had.

1 I also want to mention the '053 patent. And this
2 has been referred to as the meta-rights patent, and it
3 contains the same repository and usage requirements. And
4 Apple doesn't infringe this for all the same reasons.

5 But Apple also does not use -- utilize the
6 meta-rights in the system. And these would be the kinds of
7 rights that would be given by a distributor to Apple and
8 that Apple, in turn, could give to its customers, but these
9 were read by Dr. Martin in a nonsensical way where the
10 meta-rights were created by Apple itself, given to Apple
11 itself, and exercised by Apple itself, and that's not what
12 the patent is about.

13 So in the end, none of the claims in these patents
14 are infringed. And every one of these requirements is
15 separate and independent. Apple does use the secure
16 container approach.

17 ContentGuard has --

18 Can we put up the Slide 30, Mr. Simmons?

19 ContentGuard argues that in the secure container
20 approach, the document is in the clear once it's fully
21 decrypted.

22 Now, I told you in the opening statement that all
23 of our witnesses have confirmed that this is a potential
24 vulnerability in the secure container system. Apple has
25 worked hard to solve the problem and to keep documents from

1 being in the clear even though it uses the secure container
2 approach.

3 They purchased Cloakware to hide the keys so that
4 hackers would have a difficult time finding them. And it
5 makes it harder for the digital work then to be encrypted by
6 the end user.

7 But as Mr. Fasoli said, if a hacker gets the keys
8 and decrypts the document, it's in the clear, it's in the
9 open. And that goes with the territory when you have an
10 encryption and key system.

11 In addition, Apple tries to decrypt just a few
12 frames at a time so as little is in the clear as possible.
13 As I said, Apple's engineers worked hard to minimize the
14 problems in the secure container system, but that's what
15 they use.

16 Now, can we put up the -- yeah, that's it.

17 The -- you heard about a license Apple has to
18 patents owned by a company called InterTrust. And if you
19 look at this article written by the folks at Xerox, they
20 describe the secure container approach and they listed
21 InterTrust as an example of that, and that's why Apple paid
22 for a license from InterTrust.

23 Now, I also talked about the validity of the
24 patents in my opening statement, and we do have a clear and
25 convincing burden of proof on that, and we believe we

1 brought you evidence that is clear and convincing. You are
2 the final authority in our system and are entrusted to
3 decide whether patents are valid or invalid.

4 We brought you evidence, including Dr. Steve
5 White, who began working in this field over a decade before
6 Dr. Stefik. In 1987, he wrote a paper that explained his
7 invention, and he also told you about subsequent
8 improvements to his DRM system that were described in an
9 article by Tygar and Yee, and all of this was before the
10 Stefik patents.

11 Now, even Dr. Stefik's colleagues at Xerox
12 acknowledged that Dr. White invented a DRM system before
13 Dr. Stefik. We looked at this document a number of times
14 during the trial.

15 And it says right in it, the trusted system
16 approach, giving these examples, Stefik, Tygar, and Yee, and
17 White. And they're pointing exactly and identifying White
18 and Tygar and Yee as coming -- having come up with trusted
19 systems before Dr. Stefik.

20 So there's really no question that White and Tygar
21 and Yee designed these before Dr. Stefik.

22 I want to talk for a few minutes about damages,
23 not because there's a question about whether Apple
24 infringes, but because we think it goes to the credibility
25 of the Plaintiff's case. If you agree with us that there's

1 no infringement, then the damages are zero because
2 ContentGuard is not entitled to money.

3 As you have heard, damages in a patent case are
4 determined by a reasonable royalty, what would have been
5 negotiated in this case in 2005.

6 ContentGuard is asking you for almost a billion
7 dollars for five patents, four of which have expired. And
8 you heard how they hired three experts to come up with this
9 theory.

10 You heard about the surveys that Dr. Prince did --
11 came up with numbers that people would pay \$78 to download
12 movies to watch them on iPhones, and yet you heard from
13 witnesses in the case it isn't that common for people to use
14 iPhones to watch movies anyway.

15 He also asked people what they'd pay to have
16 Google Play on Google Android devices as part of this
17 survey. They came up with a different number for the Google
18 Play. And he admitted on the stand that he would never
19 apply these results to Apple devices.

20 But when he handed his survey results to
21 Dr. Teece, Dr. Teece did exactly what Dr. Prince said he
22 shouldn't do. He took the Google Play number and then
23 applied it to Apple devices. And he did all of this despite
24 the fact that the Google Play system doesn't infringe the
25 ContentGuard patents.

1 Now, let's pause for a moment on that. Google has
2 a huge and successful business of selling and renting
3 digital works online, movies, books, videos, songs. They
4 have a DRM system to protect the works. You heard that
5 Google's DRM system does not infringe the ContentGuard
6 patents. The ContentGuard witnesses and experts admitted
7 that.

8 And what that tells you is that there are ways to
9 have DRM without using ContentGuard's patents, and that's a
10 critical assumption that Dr. Teece made that you couldn't do
11 it without infringing these patents. It's not true. Google
12 has a system that doesn't infringe the patents.

13 So what is the real-world evidence? And we have
14 quite a bit of real-world evidence, and we've put on the
15 slide, tried to summarize that real-world evidence.

16 We know there are other license agreements that
17 have been entered into. They show what people paid to get
18 rights to hundreds of ContentGuard patents worldwide.

19 Now, remember, there is no evidence in this case
20 that any of these licensees are actually using the five
21 specific claims that are asserted in this case. They paid
22 these amounts for the rights to hundreds of patents
23 worldwide.

24 You may see slides from Mr. Baxter that take these
25 numbers and manipulate them and distort them, but these are

1 the numbers -- the actual numbers that appear in those
2 agreements.

3 ContentGuard tried to run from these licenses, but
4 these represent the real-world arm's-length transactions.
5 They tried to pass them off saying they're for feature
6 phones, not smartphones. But that isn't true. These
7 licenses granted the right to make smartphones and lots of
8 other things.

9 ContentGuard tried to tell you that there are
10 per-unit rates in these licenses, tried to imply them. But
11 the witnesses admitted that they're not there. And the
12 per-unit rates that are there had never actually been paid.
13 The amounts are much lower. These are the amounts actually
14 paid.

15 Apple's internal cost information is also shown,
16 and this is the cost of the Cloakware license and of
17 developing the DRM technology -- Apple's cost to develop it.
18 And this gives you a sense of what it's worth to companies
19 to have and develop DRM technology in the real world.

20 And we see the number 16 million and 30 million.
21 16 million is what ContentGuard internally valued an Apple
22 license at back in 2005, the relevant time, and they valued
23 it at 30 million in 2008.

24 And this was done a year after Apple had launched
25 the iPhone and five years after Apple launched the iTunes

1 Store. So this is with full knowledge of what it is that
2 Apple was doing. And this was put in a report to
3 ContentGuard's board of directors.

4 Now, ContentGuard and its new owner, Pendrell,
5 asks you to ignore it because it completely undermines the
6 billion-dollar claim they've talked about in this courtroom.

7 ContentGuard ignores the real-world evidence so
8 that they can give you this grossly inflated number. And I
9 ask you to think, what does that tell you about the other
10 things that they've been saying in this case?

11 Now, there should be no damages because Apple does
12 not infringe and because the patents are invalid. But if
13 you do award a reasonable royalty, I submit that you have
14 real-world evidence to guide you.

15 You could go on the low end of this scale and
16 award something like what Dr. Prowse pointed to, what Apple
17 would pay for the patents in the 2 to 3-million-dollar range
18 for the rights to that, or you could go with what
19 ContentGuard described that it would willingly take from
20 Apple in 2008 in a presentation to its own board of
21 directors, or you could find a number in between that you
22 considered reasonable.

23 Last week I told you that in the end, ContentGuard
24 hopes that you're going to throw up your hands and find that
25 Apple infringes because it has a DRM system, and you heard

1 plenty of that from the other side.

2 You heard them say that Apple's FairPlay system is
3 trusted and secure. You heard them say that it is
4 unimaginable that Apple doesn't have good security.

5 And that's exactly what I expected them to tell
6 you because they can't prove the infringement case, which
7 has to be done, by the claims and the requirements and the
8 instructions we get from Judge Gilstrap.

9 FairPlay is different, and I submit that if they
10 could match the claims of the ContentGuard patents to what
11 Apple does, they wouldn't be arguing that FairPlay infringes
12 because it's a good system or a secure system or it works.

13 Now, the way our system works, Mr. Baxter's going
14 to get another chance to talk to you this morning, and I'm
15 not going to get a chance to respond to what he tells you in
16 the next 20 minutes.

17 THE COURT: Two minutes remaining.

18 MR. PRITIKIN: Thank you, Your Honor.

19 But I would ask you as you listen to what he says
20 in the next 20 minutes, keep in mind and ask yourself: If
21 David Pritikin had a chance to respond to that, what would
22 he say?

23 This case is important to Apple. Apple doesn't
24 take charges of patent infringement lightly. And if you
25 look at the actual requirements of ContentGuard's patents,

1 if you think about the different ways that Apple's products
2 work, and if you apply the law as Judge Gilstrap has
3 instructed you, we're confident that you will conclude that
4 Apple does not infringe, and we ask you to return that
5 verdict.

6 Thank you, once again, for the time and the
7 attention that you have devoted to this case, and thank you
8 for your service as jurors.

9 THE COURT: All right. The Plaintiff may present
10 its final closing argument to the jury.

11 You have 20 minutes remaining, Mr. Baxter. Would
12 you like a warning on your time?

13 MR. BAXTER: Yes, at 10 and 2, Your Honor, if the
14 Court pleases.

15 THE COURT: 10 and 2.

16 MR. BAXTER: Thank you.

17 THE COURT: You may proceed.

18 MR. BAXTER: Thank you, Your Honor.

19 May it please the Court.

20 I want to try to get to -- back to some facts,
21 Your Honor -- Your Honor, and ladies and gentlemen of the
22 jury, if I can, and let's see where we can start.

23 Let's start, first of all, with whether or not the
24 software has a digital certificate. Remember, he said,
25 well, the content doesn't have a digital certificate so we

1 lose right there.

2 Can you get me up the Fasoli quote, please,
3 Mr. Diaz?

4 Well, we asked their engineer about this, and
5 here's what he says, and it's going to appear on your screen
6 here in just a second. I'm going to go ahead and start
7 reading it.

8 So it's got to be there, that cryptographic
9 signature, that digital signature that accompanies a movie,
10 a TV shows, or a rental movie has to exist for FairPlay to
11 allow the consumer to play that movie, TV show, correct?

12 Here's what he said: Yes, it has to be there. It
13 has to be valid for the movie to play.

14 Listen to this: So all the content, TV shows,
15 movies, rental, or purchased to be played have to be
16 accompanied by a digital signature when they arrive on the
17 consumer's device, correct?

18 Now, Mr. Pritikin would tell you the answer to
19 that question is no, and we lose. But instead, his engineer
20 said: Yes, that is correct.

21 Can you get that up, Mr. Diaz? Do you have that
22 quote?

23 All right. Well, that's what he said. When we
24 asked him: Do you have to have a digital signature for all
25 the content? He said: Yes.

1 Now, that's the end of that story. Their engineer
2 said you had to have a digital certificate or it won't play.
3 And of course, that's absolutely true.

4 Let's talk about Akamai just a moment. We already
5 know that he's told us that Akamai is irrelevant to how DRM
6 handles the Apple system.

7 He also told us this: He said, how long have you
8 been at Apple, sir?

9 He said: For over ten years.

10 How many times have you seen anybody compromise
11 Akamai and insert malicious code in the movies that a
12 customer got downloaded?

13 What'd he say? Never. Never.

14 Akamai, as you heard Dr. Goodrich say, is just out
15 there on the Internet. And it uses Akamai just to cache the
16 movies.

17 Well, then his next point was: Well, the patents
18 require you to have storage, that the repositories storage.

19 And we asked him this: And I believe we heard
20 earlier testimony in this case that Apple has about 1.25
21 petabytes, I think that was, was the name of the information
22 that stores for its DRM-protected content. Does that sound
23 about right?

24 That sounds about right. Again, I'm not the
25 expert in that area, but that sounds about right.

1 And that's stored on computers that Apple owned
2 and controls at Apple's headquarters, right?

3 Well, certainly not the distribution copies.

4 The originals are stored there, right, sir?

5 Yes, that's correct.

6 So what does Apple do about storage of its
7 content?

8 They store them on servers that are iTunes
9 servers.

10 Those Akamai servers, as he said, are irrelevant
11 to the DRM-protected content. They simply don't make any
12 difference. They store the original movies right there on
13 the iTunes Servers. So -- so much for servers -- storage
14 and so much for software.

15 And then he said: Well, it's not attached or
16 treated as attached. And I kept waiting for him to explain
17 if that were true, why the Judge said "or."

18 You remember the slide -- can I see the slide,
19 Mr. Diaz, with the plane and the train?

20 Do you remember? I said: You can go to Atlanta
21 on the plane or you can go on the train.

22 The Judge said attached or treated as attached,
23 and it will not work if those usage rights are not treated
24 as attached to the content.

25 And I kept waiting for him to explain why his

1 expert said those are exactly the same, and I heard no
2 explanation. And of course, the reason is they simply are
3 not the same, and that's not the way that it works.

4 Well, then I heard this new topic about: Well,
5 the Macs and the PCs aren't trusted repositories and
6 therefore your whole case falls.

7 Now, remember, the Judge told you that they've got
8 to be trusted repositories when they're used in conjunction
9 with usage rights, when they're enforcing usage rights.
10 That's when they've got to be trusted repositories.

11 Well, when are they trusted repositories in
12 conjunction with this case? And that is when they're using
13 the content off iTunes.

14 Well, when they're connected to the iTunes Store,
15 then they are trusted repositories, and here's the reason
16 why. Because they're connected over an SSL. They're
17 connected over a secure line over the iTunes Store because
18 that's how iTunes works.

19 The iTunes software is installed with digital
20 certificates. That's how you know they're a trusted --
21 repository. The rest of the time it doesn't make any
22 difference. The rest of that software that's on the
23 computers doesn't count.

24 If they're doing some sort of spreadsheet, it's
25 not using something in conjunction with usage rights, and

1 that's why it doesn't make any difference. But when it's
2 using content from the iTunes Store, it is a trusted
3 repository. And now we're through with that.

4 Well, then he told you, well -- here's his last
5 one, the isKind -- "isRental" and the "kind" fields, he said
6 that Dr. Goodrich said: Well, that's all I got, and
7 therefore you lose.

8 Well, here's the problem with that. What
9 Dr. Goodrich really said is for the "isRental" field, those
10 numbers in the "isRental" field are exactly the same number
11 that are on the keys. There's no difference.

12 And that he further explained to you that the
13 usage rights are enforced on the RentalBag, which is exactly
14 what he said both on direct and when we got up here in
15 rebuttal, that that's what enforces it is exactly the same
16 numbers, and they're enforced in both places.

17 As far as the "kind," which you saw there was a
18 trick where the engineer says: Well, look, I'm going to act
19 like a hack -- hacker. I've got special tools that nobody
20 else has. I'm going to eliminate the fields and show it
21 doesn't work.

22 The problem is that the "kind" fields uses iTunes
23 to enforce as the usage right. Dr. Goodrich never said the
24 "kind" field by itself does it. What he said was that the
25 "kind" field, along with iTunes, enforces the usage rights,

1 and that's exactly what happens.

2 In the Apple system, those two fields, along with
3 the Rentalbag and the iTunes Store, enforces the usage
4 right, and you know that's happened because we saw it on the
5 phone.

6 You can pick up the phone, rent the movie,
7 purchase the movie, and you see the usage rights appear on
8 your phone. They aren't suggestions. They aren't hints.
9 It's actually what happens when you use the phone to enforce
10 the usage rights. And if he didn't enforce the usage
11 rights, it won't work, and the movie studios won't let you
12 do it.

13 And then they said: Well, we had that Internet
14 license -- that InterTrust license that they paid
15 \$124 million for.

16 They said: Look, that's what we used. You know
17 what they needed the InterTrust license for that they
18 refused to take for seven years? DRM-free music.

19 They finally said: Well, if we're going to use
20 DRM-free music, we've got to have the InterTrust license
21 because that is a true secure container.

22 And I kept waiting for him to explain in the
23 secure container which says in the patents that the user,
24 me, you, can use it -- it's in the clear because that's what
25 he promised you when he started this case.

1 Not one word about it, not one. Never explained
2 to you why he tried to trick you and fool you up front by
3 saying it was the secure container. But at the end of the
4 day, it turned out not to be true because that's what
5 they've been trying to prove the whole time.

6 Well, those excuses didn't work. So finally, he
7 said: Well, damages, maybe -- maybe you won't penalize us
8 because the numbers are big.

9 Now, here's the situation that we're in. The
10 Judge tells you that you're bound by the Georgia-Pacific
11 Factors and that you are to assume that the parties met in
12 2005, that they have all of this knowledge about what's
13 going to happen in the future, and the patents are valid and
14 infringed and they can't leave their room until -- room
15 until they cut a deal.

16 And here's what the Apple guy told you.

17 THE COURT: Ten minutes remaining.

18 MR. BAXTER: Thank you, Your Honor.

19 I believe the number ought to be what it costs to
20 buy the chainsaw that cut all your trees down. Now, that's
21 what it amounted to.

22 We've taken your patent -- I'm sitting here in the
23 room saying: I took your patent. I'm saying your patent is
24 valid. I'm saying that I'm not going to leave until we make
25 a deal. And by the way, I only pay 195 for the chainsaw,

1 and I think that's fair. And you ought to take it because
2 I'm Apple. Now, that's what he said in this case.

3 Oh, he said one more thing. He said: By the way,
4 I've got this great idea about how I could walk or fly in a
5 bag, the update over to North Carolina and over the 10 or 15
6 years, that would cost about a million two and that'd be
7 fair.

8 Now, that tells you about their case right there.
9 It really tells you that all of their non-infringement came
10 down to this. That's what they had their guy say. I'm
11 going to fly it on a plane.

12 You know, if I could sing, I would have broken out
13 to I'm Leaving on a Jet Plane. That's what I would have
14 done, because that's what they said.

15 How silly is that? I believe it's the silliest
16 thing I've ever seen an expert say in my 45 years of trying
17 lawsuits, that they're going to take that precious cargo of
18 theirs and for 10 years they're going to fly it on a plane
19 to North Carolina and hope it gets there.

20 But that's really what their non-infringement case
21 boils down to. They hoped they could hunt that one, and it
22 didn't work, and so they gave it up, and you didn't hear
23 anything about it in that closing statement, did you?

24 Well, here's what they really said: I want to
25 give you less than a quarter of a penny for each of the

1 infringing devices and pieces of content that we have taken
2 in violation of your patents. They're sitting there in the
3 room with the patent being valid and infringed telling us
4 that.

5 Here's what the facts are. The rate card -- the
6 rate card that ContentGuard had at that time would give us a
7 number that was \$259 million if we just got our rate card,
8 which is a whole lot more reasonable.

9 If we had gotten the rate that we'd gotten on one
10 of our other licenses, it'd be 314 million. If we'd gotten
11 the rate we've gotten on another one of our licenses, it'd
12 be 335 million.

13 And if you look at the entire panoply of rates
14 that we've gotten and apply it to the Apple devices -- it'd
15 be 259, 312, 314, 335 -- the 882 doesn't seem out of line,
16 and that doesn't even take into consideration the Amazon
17 license of which they didn't want to talk about because you
18 heard what that rate was, and that would make the bars even
19 go higher.

20 Now, ladies and gentlemen, at some juncture, even
21 Apple has to come to heel about taking somebody else's
22 property, even Apple.

23 And they want to make fun of the number because
24 it's so big, and it is a big number, and I know it's a big
25 number, and I told you that up front.

1 But as we looked at those slides of cutting down
2 those trees and we talked about that during voir dire, we
3 talked about was it fair to cut down the trees and pay you
4 for one of them or half of them or two-thirds of them, and
5 each -- each of you told me that wasn't fair.

6 Now, I know the number is big, but I'm not ashamed
7 of that because Apple has used our patent in such a way as
8 to make themselves the largest technology company in the
9 world by using content.

10 And you saw those quotes from Jobs and from their
11 executives saying how incredibly important it was. They
12 wouldn't have even gotten the iTunes Store off the ground if
13 they didn't have DRM-protected content. And you saw all of
14 the contracts from all of those movie companies saying, if
15 you don't have DRM-protected material, you're not going to
16 get our movies.

17 Mr. Diaz, could I see one of those ads? Let me
18 see the ad that -- that's got the -- the pop-out.

19 Here's their latest ad. Here it is without us.
20 Great phone. It's the Apple iPhone 7. Better reception,
21 better email, better text, and less clutter because you
22 don't have any movies, you don't have any books, and you
23 don't have any TV shows, and you've got a lot more storage.

24 Now, don't you have a picture of that coming on
25 your TV screen that Apple's going to tell you that that's

1 their latest phone? Good reception, great screen. By the
2 way, you don't get this content.

3 Let me see the next one, Mr. Diaz.

4 He talked to you about Google, and he said: Oh,
5 well, the Google -- the Google Play doesn't infringe. And
6 we asked Dr. Tribble if he was going to put Google on his
7 phones, and basically, it was not in my lifetime.

8 We had a picture of this phone and the ad, all the
9 latest features. Has a wonderful Android movie feature
10 straight from Google. Just like Samsung, except you can't
11 download a movie directly from the app.

12 Remember when we showed you that demonstration and
13 you couldn't download from the app? You can eventually get
14 it on your iPad or your phone. It just takes you 14 steps.

15 Now, that's what they're left with, ladies and
16 gentlemen. And for that -- for them not to be able to do
17 that, we're asking they pay a buck 75 for the phone one
18 time. Not every time you download a movie or a book. One
19 time. That's all.

20 And they want to blame us because they've sold so
21 many of them. And they say: Well, we're too big to pay.
22 That's too much money.

23 Ladies and gentlemen, I'm here to tell you that
24 that's not right, that that's not how the system works. And
25 when you take somebody's property, when you deliberately

1 take it, that's just not how it works.

2 There's another question, and I want to go over
3 the questions with you if I can.

4 Mr. Diaz, can you show me the verdict form?

5 Here's how it works. The Judge is going to give
6 you a verdict form, and my suggestion to you is that when
7 you get to it, the very first question has to do with
8 infringement and asks if they infringe, and the answer to
9 each one of those questions on No. 1 is yes.

10 When you get to No. 2, it's going to ask you: Are
11 the claims invalid? And the answer to all of that is no.

12 Now, remember what the invalidity evidence is,
13 that Dr. White comes up here and says, oh, if you take my
14 efforts and you combine it later on with somebody else's,
15 it's obvious.

16 The problem is it was so obvious that he couldn't
17 even do it. Five years later, he couldn't do it. And
18 neither could anybody else. And everybody in that field up
19 until 1994 was struggling how to do it, and nobody could.
20 But Dr. White now, 20 years later with lots of hindsight,
21 says, oh, it was very obvious.

22 THE COURT: Two minutes remaining.

23 MR. BAXTER: But in 1999, he couldn't do it.

24 Next question.

25 These are the numbers. I suggest you write 882

1 and a reasonable number in Question 3.

2 And the next one, ladies and gentlemen, has to do
3 with willfulness.

4 If I could see the slide.

5 The answer there is that they willfully did it.

6 Can I see the slide, Mr. Diaz, about all the times
7 we contacted them?

8 Here is all the correspondence. Here is all the
9 meetings. We went to Apple. We said: Here are our
10 patents. We have this trusted system. We want you to take
11 a look at it. We even would like to go into business with
12 you.

13 They said, no, no, no, no, no. Go away. We don't
14 want to talk to you. We're going to put out our own thing.
15 And their own thing turned out to be our thing.

16 That's willful, ladies and gentlemen, and we
17 suggest you answer that question yes.

18 Now, they've got lots of excuses. We've gone over
19 those.

20 But at the end of the day, they've got to do the
21 right thing.

22 Now, we're a small company. And I tell you what,
23 it take some courage to take on somebody as big as Apple.
24 This is life or death for us. But we're willing to take
25 them on, the biggest company in America.

1 And we said: You took our patent. You used it.
2 You used it to do all these things that you've done, but at
3 the end of the day, you've got to do the right thing.

4 And we, ladies and gentlemen, trust you to do the
5 right thing.

6 We thank you very much for all of your attention
7 and for all of your hard work. And we put our company in
8 your hands.

9 Thank you, Your Honor.

10 THE COURT: Ladies and gentlemen, I'd like to
11 provide you with a few final instructions before you begin
12 your deliberations.

13 You must perform your duty as jurors without bias
14 or prejudice as to any party. The law does not permit you
15 to be controlled by sympathy, prejudice, or public opinion.
16 All parties expect that you will carefully and impartially
17 consider all of the evidence, follow the law as I have given
18 it to you, and reach a just verdict, regardless of the
19 consequences.

20 Answer each question in the verdict form from the
21 facts as you find them to be. Do not decide who you think
22 should win and then answer the questions accordingly.

23 I remind you, your answers and your verdict must
24 be unanimous.

25 Ladies and gentlemen, you should consider this

1 case and decide this case as a dispute between persons of
2 equal standing in the community, of equal worth, and holding
3 the same or similar stations in life.

4 Counsel may have argued about one company being
5 larger than the other, but I'm instructing you that you are
6 to answer the verdict form and decide this case as between
7 parties of equal standing, equal worth, and same or similar
8 stations in life.

9 This is true in patent cases between corporations,
10 partnerships, and individuals.

11 A patent owner is entitled to protect its patent
12 rights under the United States Constitution. This includes
13 bringing a suit in the United States District Court for
14 money damages for infringement, as we have here.

15 An alleged infringer is entitled to defend itself
16 against such a suit as we have here. This includes offering
17 proof that it does not infringe the patents and that the
18 patents are invalid.

19 The law recognizes no distinction between types of
20 parties. All corporations, partnerships, and other
21 organizations stand equal before the law, regardless of the
22 size or who owns them, and they are to be treated as equals.

23 When you retire to the jury room and deliberate
24 upon your verdict, you'll each have a copy of these
25 instructions to take with you.

1 If you desire during your deliberations to see any
2 of the exhibits -- not the demonstratives, but the exhibits
3 that have been introduced during the course of the trial,
4 then you should advise me by sending a note to me by way of
5 the court security officer. And in response to that note, I
6 will send you such exhibit or exhibits.

7 Once you retire, you should proceed to select your
8 foreperson and then to conduct your deliberations.

9 If you recess during your deliberations, follow
10 all the instructions that the Court has given you previously
11 about your conduct during the trial.

12 After you have reached your verdict, your
13 foreperson is to fill in the verdict form with your
14 unanimous answers to the questions.

15 Do not reveal your answers until such time as I
16 have discharged you as jurors or until I have directed
17 otherwise. You must never disclose to anyone, not even to
18 me, your numerical division on any question.

19 Any notes that you've taken during the trial are
20 aids to your memory only. You should rely on your memory
21 and not your notes. The notes are not evidence.

22 A juror who has not taken notes should rely on his
23 or her independent recollection of the evidence and should
24 not be unduly influenced by the notes of other jurors.
25 Notes are not entitled to any greater weight than the

1 recollection or impression that each juror has of the
2 testimony.

3 If you want to communicate with me at any time,
4 please give a written message or a question to the Court
5 Security Officer who will bring it to me. I will either
6 then respond to you in writing or by bringing you back into
7 the courtroom where I can address you orally.

8 In either case, I will respond as promptly as
9 possible. However, I will always first disclose to the
10 attorneys your question and my response before I answer your
11 question.

12 After you have reached your verdict and have been
13 discharged by me as jurors in this case, you are not
14 required to talk with anyone about your service as jurors or
15 about this case unless the Court orders otherwise.

16 However, if you want to discuss at that time your
17 service as jurors, you may. That decision, ladies and
18 gentlemen, is yours and yours alone. It's solely up to you.

19 I'm now going to hand eight copies of these final
20 jury instructions, along with one clean copy of the verdict
21 form, to the Court Security Officer who will -- who will
22 deliver them to you in the jury room.

23 COURT SECURITY OFFICER: Thank you.

24 THE COURT: Ladies and gentlemen of the jury, you
25 may now retire to deliberate on your verdict. We await your

1 decision.

2 COURT SECURITY OFFICER: All rise for the jury.

3 (Jury out.)

4 THE COURT: The Court stands in recess either

5 awaiting a question from the jury or a verdict.

6 We are in recess.

7 (Jury deliberations.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/Shelly Holmes
SHELLY HOLMES, CSR, TCRR
Official Court Reporter
State of Texas No. 7804
Expiration Date: 12/31/16

11/20/15
Date